In The

Supreme Court of the United States

October Term, 1968

No. 238

DAVID I. WELLS,

Appellant,

—v.—

NELSON A. ROCKEFELLER, as Governor of the State of New York, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, MALCOLM WILSON, as Lieutenant Governor of the State of New York, and Presiding Officer of the Senate of the State of New York, and ANTHONY J. TRAVIA, as Speaker and Presiding Officer of the Assembly of the State of New York,

Appellees.

BRIEF FOR APPELLANT

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Opinions Below

The opinion of the three-judge court dismissing the complaint (A. 44-50) is reported at 281 F. Supp. 821. The prior opinion of that court, holding an earlier New York State congressional districting statute invalid, and retaining jurisdiction (A. 20-36), is reported at 273 F. Supp. 984. The prior opinion of this Court affirming that earlier judgment (A. 40-43) is reported at 389 U.S. 421.

Jurisdiction

On April 1, 1968, the three-judge court entered an order and judgment dismissing the complaint which had sought to enjoin defendant state officials from performing various procedures in connection with the election of Members of the United States House of Representatives from New York State because the New York State congressional districting laws of 1961 and 1968 were asserted to violate Article I, Section 2 and the Fourteenth Amendment to the Constitution of the United States. A notice of appeal to this Court was filed in the district court on April 30, 1968. The jurisdictional statement was docketed in the Supreme Court of the United States on June 26, 1968. This Court noted probable jurisdiction on October 14, 1968, reported at 393 U.S. .....

This suit was brought under Article I, Section 2 and the Fourteenth Amendment of the United States Constitution, and under 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. § 1343(3). Declaratory relief was sought under 28 U.S.C. §§ 2201, 2202, and 2281 et seq. The jurisdiction of the Supreme Court of the United States to review this case by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b).

Constitutional and Statutory Provisions Involved

This appeal presents a claim that Chapter 8 of the New York Laws of 1968 (A. 74-104) is invalid because it violates those portions of the Constitution of the United States set forth below:

Article I, Section 2:

> The House of Representatives shall be composed of Members chosen every second year by the People of the several States . . .

Fourteenth Amendment, Section 1 (second sentence):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

Appellant, David I. Wells, is a citizen of the United States, and a resident of Queens County in the City and State of New York. He is a taxpayer and a registered voter of said county, city, and state. As such he is entitled to vote for candidates for the House of Representatives in the sixth congressional district of New York State in which he also resides.

Appellant was one of two plaintiffs (the other not being joined in this appeal) who filed this suit on June 29, 1966, in the United States District Court for the Southern District of New York against appellee Nelson A. Rockefeller, Governor of New York State, and other state officials directly implicated in the process by which the Members of the House of Representatives from New York State are chosen by the voters of that state.

In the original complaint plaintiffs asked for the convening of a three-judge court which was in turn asked to hold invalid and unenforceable Article VII, Section 111, Chapter 980 of the Laws of 1961 of New York State (effective from January 1, 1962) as being contrary to Article I, Section 2 and the Fourteenth Amendment to the Constitution of the United States. Accordingly, plaintiffs asked that the court restrain defendants Rockefeller, Lefkowitz, and Lomenzo from in any way implementing the complained-against provisions of the election laws. Appellants further asked the court to direct defendants Wilson and Travia,*

* Anthony J. Travia is now a judge of the United States District Court for the Eastern District of New York and thus no longer involved in this appeal. No successor has been chosen for his former position as Speaker.

in their capacity as legislative leaders in the State of New York, "to take such action as may be directed by this Court to secure compliance with the Constitution of the United States."

A three-judge court was convened to hear the matter, and the issues were framed by plaintiffs' motion for summary judgment and defendants' motion to dismiss the complaint. Relevant facts about the statute were these: On the basis of the 1960 census figures Congress reduced the number of New York's Congressional Representatives from 43 to 41, and Chapter 980 was enacted to establish the boundary lines of these 41 districts. However, as the court below found, the districts did not satisfy the test of "equal representation for equal numbers of people" established in *Wesberry* v. *Sanders*, 376 U.S. 1, 18. For example, the twelfth district (part of Kings County) had a population of 471,001, 15.1 per cent above average, while the adjoining fifteenth district (also part of Kings County) had a population of 350,635, 14.3 per cent below average—a spread between these two contiguous districts of 29.4 per cent.

The court, after pointing out other excessive population differentials, observed that further comment on "the seemingly bizarre structure of the present Congressional districts is unnecessary" to the holding of unconstitutionality. 273 F. Supp. at 987. Accordingly, the court held that "reapportionment is required." *Id.* at 989. The court said the legislature should "divide the State into 41 substantially equal parts, provided they be reasonably compact and contiguous." *Id.* at 991. And the legislature was warned against allowing "considerations of race, sex, economic status or politics to cross their minds." *Ibid.* As to timing the right was declared to be a present one; accordingly, the district court ruled that no further elections could be held based on the invalid districts. The court ruled (at 992):

> a plan must be created by the 1968 Legislature which will provide for congressional districts in conformity

with the Supreme Court's precepts so that the people of the State of New York may vote for their congressmen from such districts in the 1968 congressional elections.*

The judgment of the District Court was affirmed *per curiam* by this Court on December 18, 1967. 389 U.S. 421. Mr. Justice Harlan dissented, believing that "the time has come for this Court to provide clearer guidance to the lower courts on the proper remedy in reapportionment cases." *Id.* at 424.

The New York Legislature took no action until February 26, 1968, a date so late that it was then impractical to secure effective review of a district court decision upholding the validity of the revised districts. It thus became necessary to hold the 1968 election under the new plan unless (as no one favored) election of all 41 Congressmen should be at large.**

The plan adopted by the legislature on February 26, 1968 (Chapter 8 of the Laws of 1968) left population disparities ranging up to 6.6 per cent variation from the state average district population producing a spread between the least populous and the most populous district in excess of 14 per cent. The "lack of compactness" complained against in the original complaint, which had been described as "bizarre" by the court, remained unchanged in many districts and little changed in others. Although the district

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* The court also invited legislative consideration of population statistics later than the 1960 census figures, suggesting a projection to December 31, 1966. 273 F. Supp. at 992. However, this was rejected by the legislature and not further adverted to by the court in its subsequent opinion. 281 F. Supp. 821. The issue is not raised in this case.

** The hearing before the three-judge court was on March 12, 1968; the opinion was delivered on March 20; and judgment was entered on April 1, the day before the first day to circulate nominating petitions for the primary to be held on June 18, 1968.

court had said in its 1967 opinion that "there is a burden on the proponent of any districting plan to justify deviations from equality" (273 F. Supp. at 987), defendants (hereafter the State) advanced no justification for continued population deviations and continued lack of compactness other than the exigencies of time, the legislative purpose to disrupt existing voting patterns as little as possible, and the desire to increase representation of the minority party in Congress.

The district court, which had retained jurisdiction of the action, received objections, including those of intervenors, at a hearing on March 12, 1968 (A. 105-42). The State sought to justify the plan on the basis of the explanation for the changes that appeared in the Interim Report of the Joint Legislative Committee on Reapportionment (A. 53-73) and the testimony of witnesses at the hearing.

Intervenors Frederick W. Richmond, a resident of the fourteenth district, Eugene Victor, a resident of the old twelfth and t[illegible] new fifteenth district, and Armand J. Starace, a resident of the Bay Ridge area of Kings County, all complained of the way the districts were drawn in that county. They argued that the integrity of neighborhoods had been violated and that the new lines represented bipartisan agreement to protect incumbents.

Intervenors Mary Leff and Kathryn Goldman objected to the new lines for the twenty-first and twenty-third districts in Bronx County.

Intervenors Andrew Cooper, Paul S. Kerrigan, and Joan C. Bacchus were primarily interested in Kings County districts. John R. Pillion also intervened.

Intervenors Samuel I. Popack, Simon Goldman, Shirley Levitin, Danny Carter, Israel Chanowitz and Rabbi S. H.

Fox objected to the division of their community, Crown Heights in Brooklyn, between the new tenth and twelfth districts.

In an opinion announced on March 20, 1968, the three-judge court upheld the plan, observing that it would give the voters "an opportunity to vote in the 1968 and 1970 elections on a basis of population equality within reasonably comparable districts." 281 F. Supp. at 826. This Court noted probable jurisdiction on October 14, 1968 (393 U.S. .....). No intervenor perfected an appeal.

Summary of Argument

The principle of substantial population equality is now firmly established as the standard applicable to state legislative election districts (*Reynolds* v. *Sims*, 377 U.S. 533), congressional districts (*Wesberry* v. *Sanders*, 376 U.S. 1), and election districts for units of local government (*Avery* v. *Midland County*, 390 U.S. 474). Compliance with the equal-population requirement of the two 1964 decisions—*Reynolds* in relation to state legislative districts and *Wesberry* in relation to congressional districts—has been substantial; and there is no reason to doubt that *Avery*, making the same principle applicable to units of local government, will be implemented with equal promptness.

The principle for which these decisions stand is extremely important for representative government in the United States. Implementation of the equal-population standard has gone far to restore public confidence in a system that seemed undemocratic and unfair so long as malapportionment prevailed in most legislative bodies and continued to increase nearly everywhere.

It would be a mistake, however, to believe that the problems of inequality in representative government are

solved by a determination that "as nearly as is practicable one man's vote . . . is to be worth as much as another's." *Wesberry* v. *Sanders*, 376 U.S. at 8. Compliance with the letter of this ruling eliminates the most apparent voting rights discrimination, which might be called population gerrymandering. Without more, however, equality-subverting gerrymandering remains possible in subtle but equally virulent forms. Even within a framework of absolute equality, discrimination against (or in favor of) a political party or a racial, ethnic, or socioeconomic group requires no special skill beyond the ability to read election returns plus an understanding of the demographic factors of rural areas and city neighborhoods. Appellant contends that the 1968 congressional districting act for the State of New York represents exactly such a practice and should be forbidden as a violation of Article I, Section 2 and the Fourteenth Amendment to the Constitution. To understand why this is so, it is necessary to recall some recent political history in New York State and to note the following interlocking aspects of the 1968 New York Statute: (1) The 1968 act did not achieve population equality among the districts "as nearly as is practicable," and the State offered no satisfactory explanation of this failure to meet the equal-population standard. Indeed, witnesses for the State frankly stated that a principal objective of the districting was to achieve political balance. (2) The inconsistent treatment of counties, towns, and cities, which were sometimes broken without apparent reason, and the bizarre shapes of a number of the districts, in urban and rural areas alike, suggest, in the absence of convincing explanation to the contrary, a districting purpose designed to serve a partisan end.

When the complaint in this case was filed in 1966, the challenge was to the 1961 congressional districting act, which was invalidated by the three-judge federal district court in 1967 in a decision affirmed by this Court. The act

now challenged was approved in February 1968 by a legislature consisting of a Republican-controlled Senate and a Democratic-dominated Assembly. It is the contention of appellant that the 1968 act was the result of a bipartisan agreement, providing for each party as many "safe" seats as could be agreed upon. To understand this proposition, which of course nowhere appears as a matter of record, it is instructive to recall the political history of New York State.

In the half century before 1964 New York State gave its electoral votes almost evenly to Republican and Democratic presidential candidates and divided its electoral favors rather evenly between Republican and Democratic governors and United States Senators. Yet, during that period the Democrats won control of the state legislature only twice before 1964, in which year the Democrats gained control of both houses in the nationwide sweep of President Johnson over Senator Goldwater. During that long period New York was described as a "two-party state with a one-party Legislature." Tyler and Wells, New York: "Constitutionally Republican," in Jewell (ed.), *The Politics of Reapportionment* 221 (1962).

After 1965, however, control of the New York Legislature was divided between the parties, making it impossible for either party to establish congressional lines for its exclusive advantage. The 1968 act reflects that new spirit of accomodation.

The Court has suggested that although "it may not be possible to draw congressional district lines with mathematical precision," *Wesberry* v. *Sanders*, 376 U.S. at 18, the standard of equality is more exacting in congressional districts than in state legislative districts. *Reynolds* v. *Sims*, 377 U.S. at 578. From this it could be contended that congressional districts should be made perfectly equal in terms of population, which is entirely possible by disregard-

ing political subdivision lines wherever necessary to achieve nearly exact equality. At least eight state legislatures have chosen this route, with the result that no district exceeds the state norm by more than 2 per cent. There are, however, dangers in this practice which may conceal discriminatory gerrymandering under the bland surface of population equality.

Alternatively, a larger number of state legislatures have chosen to construct their congressional districts to the extent permissible along political subdivision lines, permitting some population variances so long as they are not excessive. Although this formula raises problems of defining "excessiveness," it is possible to measure the fairness of the plan in terms of consistency of adherence to the stated formula. As this Court observed in *Reynolds* v. *Sims*, 377 U.S. at 578-79,

> Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.

At first glance it appears that the substantial population inequalities that result from the 1968 congressional districting act might be justified by the State's "desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme." *Id.* at 578. Indeed, witnesses for the State at the hearing before the court below explicitly stated the intent to preserve counties and towns wherever possible (A. 124-25, 134, 135). When it came to cities, however, where most New Yorkers live, the witnesses sometimes spoke of preserving their unity, as in the case of New York City (A. 112), while at other times disregarding the unity of a city, as in the case of Rochester, which was divided down the middle (A.

125).* Moreover, the 1968 plan divided two cities (Lackawanna and Yonkers) and one town (Islip) without satisfactory justification. The population deviations remain unexplained unless perhaps by the political motivation that admittedly influenced other decisions. Finally, many of the district shapes remain "bizarre," as described by the district court in its 1967 opinion, *Wells* v. *Rockefeller*, 273 F. Supp. 984, 987.

All these difficulties with the 1968 act are readily ascertainable by comparing population figures and physical contours of the districts now in effect under the 1968 plan with the plan suggested by appellant to the court below as early as 1966, shortly after the complaint was filed. Appellant does not suggest that his is the only permissible plan, or even the best, but simply that a plan was readily available to legislature and court that would produce greater equality, fewer divisions of political subdivision lines, and more compact districts.

Appellant accordingly urges this Court to hold the 1968 act invalid and to enjoin its further use as the basis for congressional elections in the State of New York.

ARGUMENT

I.

The equal-population principle is vital to the effective functioning of representative government.

Malapportionment and gerrymandering for partisan, racial, ethnic, or socioeconomic purposes are anti-egalitarian and destructive of the democratic ideal of representative

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* Rochester could have been kept as a unit at the expense of about 10,000 population deviation (about 2.5% deviation), far less than the maximum deviation in the 1968 plan or more than 33,000 from the norm.

government. Until this Court's decisions in *Wesberry* v. *Sanders*, 376 U.S. 1, *Reynolds* v. *Sims*, 377 U.S. 533, and *Avery* v. *Midland County*, 390 U.S. 474, malapportionment and gerrymandering practices were firmly entrenched in nearly all American legislative bodies. Even worse, the practice was on the increase, and ordinary voters had come to believe, cynically but understandably, that no effective remedy was available at the polls.

All that changed after the recognition in *Baker* v. *Carr*, 369 U.S. 186, that impairment of individual voter rights is within the jurisdiction of federal courts and is a justiciable question. It was not long after *Baker* v. *Carr* that this Court dealt decisively with the malapportionment issue in congressional districting (*Wesberry* v. *Sanders*), state legislative districting (*Reynolds* v. *Sims*), and election districts for units of local government (*Avery* v. *Midland County*). Although the language was slightly different in the three cases, the sense of each was, as stated in *Wesberry*, 376 U.S. at 8, that "as nearly as practicable one man's vote . . . is to be worth as much as another's."

Compliance with the letter and spirit of the 1964 decisions, *Wesberry* and *Reynolds*, has been substantial.* And there is no reason to doubt that *Avery*, making the same principle applicable to units of local government, will be implemented with equal good faith and promptness. But there remain two questions on which further guidance from this Court is needed. First, the meaning of "substantial population equality" should be further clarified. Second, assuming that a gerrymander designed to discriminate for or against any identifiable group is forbidden, a matter discussed in part III of this brief, guidance is needed as to

* See Dixon, *Democratic Representation: Reapportionment in Law and Politics* 290-384 (1968); McKay, *Reapportionment Reappraised* (Twentieth Century Fund pamphlet 1968).

the kind and quantum of proof required to establish a forbidden gerrymander.

The present appeal presents both these questions. Appellant contends that the standard of "substantial population equality" is not met by New York's 1968 congressional districting act and that there is sufficient evidence of a discriminatory gerrymander to require invalidation of the act in question.

II.

The 1968 congressional districting act of New York State violates the equal-population principle of *Wesberry* v. *Sanders*, 376 U.S. 1.

A. The population inequalities in the 1968 congressional districting act are "constitutionally impermissible."

The equal-population principle cannot be reduced to a mathematical formula. It would be unwise for this Court to fix a maximum permissible population deviation from the average in terms of percentage points. There would be no rational justification for a standard of 5 per cent, for example, as compared with 4 per cent or 6 per cent or any other percentage figure.*

This Court has already provided considerable guidance as to the applicability of the equal-population principle in

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* Congress may have more latitude in this respect because of its authority to define, implement, and enforce provisions of the Constitution. See *United States* v. *Price*, 383 U.S. 787; *United States* v. *Guest*, 383 U.S. 745. But Congress has not agreed upon any definition, thus leaving the matter for adjudication on a case-by-case basis, which is probably the better practice. See Note, Congress in the Thicket; The Congressional Redistricting Bill of 1967, 36 *Geo. Wash. L. Rev.* 224 (1967). In any event, Congress could not take from this Court its authority to rule on the constitutionality of any districting statute, regardless of congressional definition.

congressional districting cases. The steps in the formulation of the controlling principle are three:

First. In *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8, this Court stated the basic proposition as follows:

> We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.

Second. Within a few months of the decision in *Wesberry* this Court in *Reynolds* v. *Sims*, 377 U.S. 533, made the equal-population principle applicable to state legislative districts as a function of the equal-protection of the laws clause of the Fourteenth Amendment. The opinion explained the possible differences between the population standard as applied to state legislative districts and to congressional districts:

> some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. . . . Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. *Id.* at 578.

Thus was established the proposition that a higher degree of equality is required in congressional than in state legislative districting.

Third. The final basic proposition in the definition of equality is that the burden of justification for any deviation from districts of equal population must rest upon the state, which must provide "constitutionally permissible" reasons. *Id.* at 579. This proposition was previewed in *Reynolds* where this Court said that:

> neither history alone, nor economic or other sorts of group interests are permissible factors in attempting to justify disparities from population-based representation. *Id.* at 579-80.

In *Wesberry* this Court observed that "it may not be possible to draw congressional districts with mathematical precision . . . ." 376 U.S. at 18. The same point was made in *Reynolds* v. *Sims,* 376 U.S. at 577 in connection with state legislative districts. But population deviations are permissible only within narrow limits. *Reynolds* confined allowable deviations to those minor variations which "are based on legitimate considerations incident to the effectuation of a rational state policy." 377 U.S. at 579. But the principal statement came in 1967 in *Swann* v. *Adams,* 385 U.S. 440, where variations in the Florida legislative formula of 30 per cent among senate districts and 40 per cent among house districts were unexplained in any rational way by the State. This Court said:

> *De minimis* variations are unavoidable, but variation of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggest that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy. *Id.* at 444.

In *Jones* v. *Falcey,* 48 N. J. 25, —, 222 A.2d 101, 107-108, the New Jersey Supreme Court elaborated this proposition as follows:

> The Constitution, as construed in *Wesberry* and *Reynolds* does not contemplate that there is a range of deviation within which a State may maneuver, with or without reason. On the contrary, the command is to achieve equality, and a limited deviation is permissible only if there exists an acceptable reason for the deviation. So a limited deviation may be acceptable if it is needed to stay with the lines of existing political subdivisions and thus to avoid the spectre of partisan gerrymandering. But the deviation may not exceed what the purpose inevitably requires. In other words, the command is to achieve population equality "as nearly as practicable," and if equality would be more nearly achieved by shifting whole municipalities to a contiguous district, the draftsman has not achieved equality "as nearly as practicable," unless some other constitutionally tenable reason (if there is any) can be shown to justify the disparity. If the lines of political subdivisions are ignored, there is no apparent reason for not achieving mathematical equality, subject of course to inevitable *de minimis* variations.

From the above-outlined three propositions emerges the basic principle that should control the present appeal: Except for inconsequential population variations, all deviations from the districting norm must be justified by the state on some rationally permissible principle other than "deference to area and economic or other group interests." *Reynolds* v. *Sims*, 377 U.S. at 447.

Formulation of the principle in these terms is not mathematical shibbolethism. The very real justification for such an exacting standard is that, if line-drawers are given larger latitude, they can distort the electoral process by the construction of districts that will serve partisan or other impermissible purposes rather than fair representation of

all voters in a democratic system. Again, the point was made in *Reynolds*, 377 U.S. at 578-79:

> Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.

Before discussing the applicability of this principle to the present appeal, it may be appropriate to examine acceptable premises for congressional districting. The following two approaches appear to be constitutionally permissible. Under one theory a state may seek nearly precise mathematical equality among the districts, allowing only deviations that are assuredly *de minimis*. A number of states have elected this route, including at least eight in which the maximum deviation from the state average is 2 per cent or less.* In Massachusetts, for example, the congressional districting plan ignored county lines completely to secure a measure of equality in which the maximum deviation was only 1.1 per cent, and the population of the most populous district exceeded that of the least populous by only 8,717, a difference of 2.1 per cent. 1967 Mass. Gen. Laws c. 472. The same is true in Ohio under its 1968 redistricting act where county lines were broken in many cases to produce a maximum deviation from the norm of 1.4 per cent and a population differential between the least and most populous districts of only 9,881, amounting to 2.4 per cent. 1968 Ohio S. Bill No. 462.

Interestingly enough, the remarkable degree of equality achieved in these two cases did not involve sacrifice of all political subdivision lines as district boundaries. In Massachusetts, where counties may be less significant than in a number of other states, the more important town and city

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* See appendix C to this brief, Population Disparities Among Congressional Districts, by States.

lines are respected. The only city divided among congressional districts is Boston, whose population far exceeds the norm for a single district. Similarly, in Ohio outside the large urban counties where division is made along ward lines, the district lines typically follow township lines where it is necessary to break county lines.

A second theory of congressional districting, probably also valid, is to determine in advance that county, town, and city lines will be respected wherever the population of those units is not large enough to require division. Of course, even here some figure must be kept in mind as the point beyond which deviations will be regarded as excessive, necessitating some departure from political subdivision lines. This was the approach of the alternative plan for congressional districts first suggested by appellant to the court below in 1966, before the first decision. The controlling principles are set forth in the margin;* and the plan itself appears in Appendices C-E to this brief.

Ostensibly, the Joint Legislative Commission on Reapportionment used a similar approach. However, it is manifest that in the resulting 1968 New York act no single standard controlled the entire process, thus permitting, as

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* "Districts shall be equal in population except where variations result from application of the principles listed below, but no such variation may exceed five per cent of the average population of all the districts. Districts shall consist of contiguous territory, but land areas in counties separated by waterways shall not be included in the same district unless said waterways are traversed by bridges wholly within the district. No city block shall be divided in the formation of districts.

"Whenever possible without violating the foregoing principles:

"(a) the number of districts comprised of parts of more than one county or of parts of more than one town or city shall be as few as practicable;

"(b) towns and cities shall be divided in preference to counties;

"(c) more populous towns, cities and counties shall be divided in preference to less populous ones;

"(d) districts shall have the shortest practicable perimeters."

will be discussed below, a number of unexplained—and often suspicious—inconsistencies in method. When these unexplained departures from a general principle of adherence to county and town lines is coupled with the frank statement in the hearing before the three-judge court that political balance was a major objective of the districting (discussed in Part III of this brief), the departures from equality (more than 14 percent between the least and the most populous district) take on new and unpleasant significance.

The invalidity of New York's 1968 congressional districting act, when tested against the equal-population principle, is best understood by noting the several ways in which it fails to meet the test of rationality, particularly in view of the State's failure to offer constitutionally permissible explanations for the deviations.

1. The population deviations among the congressional districts in New York under the 1968 statute range from 6.6 per cent below the average congressional district population to 6.5 per cent above. The percentage spread from the least populous to the most populous district in the state is 53,603, more than 14 per cent. Moreover, the population differential even between *adjacent* districts is unaccountably large. For example, two adjacent districts in the western part of the State, the thirty-eighth and thirty-ninth, differ by 53,116. In the northern part of the State the thirty-first district is 40,499 larger than the adjacent thirty-second district. As will be noted below, in connection with the discussion of appellant's alternative plan, both of these substantial differentials could have been materially reduced without breaking the lines of any county not already divided between two or more districts. The State seeks to justify these inequalities in the interest of convenience because of the shortness of time involved for the redistricting (A. 116, 122). But this will scarcely do for a constitutional infirmity that was pointed out by the

three-judge district court on May 10, 1967, more than nine months before the legislature acted on February 26, 1968.

2. The State has sought to justify some population inequalities because of the desire to preserve the unity of political subdivisions, particularly counties and towns. But the rationale is suspect because of the many inconsistencies in its application. Political subdivision lines are sometimes observed and sometimes disregarded, all in response to a theme nowhere disclosed. Examples will illustrate the point.

a. Donald Zimmerman, counsel to the majority leader and temporary president of the New York Senate, testified to "a long history in this state of recognizing the integrity of county lines and town lines. There is no such history for city lines" (A. 124-25). To the extent that proposition has been followed in New York, it has been in connection with state legislative districting, not congressional districting. In any event, the 1968 plan does not satisfy the announced standard. In Suffolk County the Town of Islip was divided unnecessarily in the 1968 plan, which had not been done even in the 1961 plan. As demonstrated in appellant's suggested plan (Appendix F to this brief), the five congressional districts in Nassau and Suffolk Counties, at the eastern end of Long Island, could have been divided to preserve the unity of the Town of Islip while assuring compact districts free of any possible complaint of partisan gerrymander. As soon as a town is unnecessarily divided in conflict with the stated principles, justification is necessary; but here none is forthcoming.

The contention that city lines need not be preserved to the extent practicable is curious. Below the state level the city is the most important unit of government. A far larger number of citizens of the State of New York look to their cities for governmental service than to counties or towns. Moreover, witnesses for the State conceded that New York City was treated as an entity (properly, in the

judgment of appellant), even though it requires breaking county lines within the city.*

Perhaps the State is reluctant to concede the significance of cities as political subdivisions because of its awareness of the way in which the 1968 act unnecessarily divides the cities of Lackawanna and Yonkers. The City of Lackawanna, just south of Buffalo, is divided in the 1968 act as part of a total arrangement in the western part of the State (identical in the 1961 act), including substantial population deviations among congressional districts 38 through 41. However, as demonstrated in appellant's alternative plan (not the suggested statewide plan submitted in 1966, but the alternative based on the 1968 statute), that same area could have been divided to assure almost precise equality of population while preserving the City of Lackawanna intact. If the Erie County towns of Concord, Collins, North Collins, Eden, Evans, and Brant, and the Cattaraugus Indian Reservation had been placed in the thirty-eighth district instead of the thirty-ninth, and if a few minor boundary adjustments had been made within the City of Buffalo, the population of the four districts could have been made almost exactly equal.**

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* In the 1968 plan Bronx and New York Counties are treated as a unit to produce nine congressional districts of nearly equal population, ranging from 4.5 to 4.6 per cent below the state average. Kings and Richmond Counties and a portion of Queens County are also treated as a unit to produce seven districts with population deviations about 1.9 per cent above norm. The rest of Queens County is treated as an entity with four districts, each about 6.2 per cent above the norm. Appellant does not quarrel with this treatment of New York City as a unit, but points out that greater equality could have been secured by treating Kings, Queens, and Richmond together, as noted in appellant's plan, appendix E. Appellant also objects to individual districts in New York City because of the gerrymandering there practiced, as described in part III of this brief.

** The State may contend that the Erie County towns were not included in the thirty-eighth district because to do so would have meant crossing the boundary of Erie County. However, the Erie County boundary is already crossed by a congressional district line: the fortieth district includes Niagara County and a portion of Erie.

The City of Yonkers, located in Westchester County, is the sixth largest city in the State. In the 1961 plan Yonkers was kept as a unit, although the population disparity between the twenty-fifth and twenty-sixth congressional districts (Westchester and Putnam Counties) was substantial. The 1968 plan achieved near equality, but divided Yonkers between the two districts. Yet under appellant's plan, dividing Westchester County alone between two congressional districts, and locating Putnam County with counties to the north, Yonkers is retained as a unit; no other city or town is divided; and the population differential is less than 1,000.

Finally, the 1968 plan divides the City of Rochester almost down the middle, along the course of the Genesee River, including with each portion of the city a good swath of adjacent countryside. Perhaps it is only coincidence that the thirty-sixth and thirty-seventh congressional districts both send Republicans to Congress, while the City of Rochester has in recent years often voted for Democratic candidates.

b. The court below, in its opinion of May 10, 1967, holding the 1961 statute unconstitutional, stated that there were, under that statute, "districts where the transferral of a single county as a unit to an adjacent district would greatly lessen the present district disparity." 273 F. Supp. at 991. The 1968 plan presents comparable problems.

The most obvious example relates to Lewis County, in the north central part of the State. There is a difference of 40,499 between the populations of the adjacent thirty-first and thirty-second congressional districts. If, however, Lewis County had been included in the latter rather than the former district, the population difference would have been only 5,999. And if in addition Hamilton County had been shifted from the thirtieth to the thirty-first district, the population difference between the thirty-first and thirty-

second districts would have been reduced to 1,732.* Comparison between the 1968 plan adopted by the legislature, and as modified by appellant's suggested shift of Lewis and Hamilton Counties, is indicated below:

	1968 Plan	*After shift of Lewis and Hamilton Counties*
30th congressional district	415,030	410,763
31st congressional district	425,905	406,923
32nd congressional district	385,406	408,655

Furthermore, if Rensselaer County, in east central New York, had been placed in the twenty-ninth district and Schenectady County in the thirtieth (instead of the reverse), the sizable deviation in population of the twenty-ninth district (4 per cent) could also have been substantially reduced, and at the same time a greater degree of compactness could have been achieved.

c. Witnesses for the State at the hearing before the three-judge court offered one additional reason to support some features of its otherwise puzzling plan: a desire to assure political balance, specifically, increased representation in Congress for the minority party. In light of that candid admission (a matter discussed in Part III of this brief), the districting pattern emerges with greater clarity. Seeming inconsistencies in rationale become understandable, and the "bizarre" shape and lack of compactness of the districts are seen to serve a purpose. The population deviations now emerge as part of that larger design. Unfortunately, the arrangement of election districts to suit partisan ends, however benign, is "constitutionally impermissible."

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* The State's assertion that "Blue-Line" counties should not be separated (A. 129-31) is an argument of momentary convenience only. In the state legislature, where homogeneity might make more sense, the "Blue Line" has often been disregarded.

In testing the constitutionality of the 1968 New York act, the answer must come primarily from examination of that act in its local context, the point to which this brief is primarily directed. Indeed, this was the advice given in *Reynolds,* when this Court stated:

> What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. 377 U.S. at 578.

When the test is as indefinite as "substantial population equality," it is particularly true that the experience in other states, while relevant, should not necessarily be viewed as controlling. It is, however, helpful to remember that most states have been able to satisfy a more exacting standard of population equality than New York. Of the states that report less favorable equality ratios than New York (see chart in Appendix C), only five have received judicial approval since the 1964 decision in *Wesberry.* California: *Silver* v. *Reagan,* 64 Cal. Rptr. 325, 434 P.2d 621; Illinois; *People ex rel. Scott* v. *Kerner,* 33 Ill. 2d 460, 211 N.E.2d 736; Kansas: *Meeks* v. *Avery,* 251 F. Supp. 245 (D. Kan.); Nebraska: *Exon* v. *Tiemann,* 279 F. Supp. 609 (D. Neb.); New Hampshire: *Levitt* v. *Maynard,* 107 N.H. 38, 216 A.2d 778. But three of those decisions, from Illinois, Kansas, and New Hampshire, predated this Court's 1967 ruling in *Swann* v. *Adams,* 383 U.S. 440, 444, requiring state justification of population deviations that are more than *de minimis.*

The California decision involved a plan with a population spread of 54,218 from the most populous to the least populous district (compared with 53,603 in New York), but a percentage deviation of only 11 per cent (compared

with 14 per cent in New York). The decision was *per curiam* without statement of reasons or citation of authority.

The Nebraska decision involved a plan with a population spread of 92,443 according to the 1960 census. Whether rightly or wrongly, the federal district court disregarded the 1960 census figures and relied instead on population projections of 1966 (from the University of Nebraska) and 1967 (from the Legislative Research Bureau) which showed the three congressional districts in Nebraska to be very close in terms of population under the plan. Accordingly, the court viewed the differential as 17,678, and treated it as a *de minimis* variation. Moreover, unlike the present case, plaintiff explicitly disclaimed any charge of gerrymandering. *Exon* v. *Tiemann,* 279 F. Supp. 609, 611. The Kansas case, *Meeks* v. *Avery,* 251 F. Supp. 245, was similar in that the court accepted population projections from a state census that showed a population spread of only 15,060, compared to the 65,007 shown by the 1960 federal census.

On the other hand, the cases set for argument with the present appeal, *Kirkpatrick* v. *Preisler* (No. 30) and *Heinkel* v. *Preisler* (No. 31), come to this Court as appeals from the decision of a three-judge court that the 1967 Missouri congressional districting statute was invalid because of a population differential of only 23,285, amounting to 5.5 per cent from the least populous to the most populous district.

This examination of other cases is not, however, particularly revealing except of the proposition that questions of "substantial population equality" require careful examination of the relevant facts of each case.

B. The 1968 New York act should be invalidated because appellant has demonstrated alternative proposals that would have reduced population inequalities while improving the consistency of the districting and making the districts more compact.

In *Swann* v. *Adams,* 385 U.S. 440, 445, this Court commented on the significance of alternative plans:

> it seems quite obvious that the State could have come much closer to providing districts of equal population than it did. The appellants themselves placed before the court their own plans which revealed much smaller variations between the districts than did the plan approved by the District Court. Furthermore, appellants suggested to the District Court specific amendments to the legislative plan which, if they had been accepted, would have measurably reduced the population differences between many of the districts.

Lower federal courts and state courts, both before and after *Swann,* have applied the same practical test, review of suggested alternative plans, as a means of testing compliance with the equal-population principle. See, for example, *Baker* v. *Clement,* 247 F. Supp. 886 (M.D. Tenn.), *Koziol* v. *Burkhardt,* 51 N.J. 412, 241 A.2d 451; *Jones* v. *Falcey,* 48 N.J. 25, 222 A.2d 101. In *Koziol* v. *Burkhardt,* 51 N.J. at —, 241 A.2d at 453, the New Jersey Supreme Court expressed the point in these words:

> In holding that the Legislature was required to adopt the plan which attained the least disparity while preserving the legislative thesis of respecting municipal lines, the trial court correctly applied *Jones* v. *Falcey* . . . .

Appellant does not contend that his suggested plan is the only, or even the best, way of reducing population inequalities among New York's congressional districts. Indeed, appellant has suggested in section A above several modifications in the statutory plan that would preserve its general pattern while sharply reducing the inequalities of the plan. Appellant's suggested plan has been available to the representatives of the State and to the court below since the original complaint was filed in this case (in June of 1966 as an appendix to the complaint). Appellant necessarily concludes that the State has failed to "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds* v. *Sims*, 377 U.S. at 577.

C. Compactness and contiguity are aspects of equality "as nearly as is practicable."

In *Reynolds* v. *Sims*, 377 U.S. 533, 568, this Court held that the Alabama legislative apportionment at issue "presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone." *Cf. Baker* v. *Carr*, 369 U.S. 186, 254 (Mr. Justice Clark, concurring). While these cases involved state legislative districts, the same point applies to congressional districts, probably *a fortiori*. Thus, in *Drum* v. *Seawell*, 250 F. Supp. 922, 925 (M.D.N.C.), *aff'd*, 383 U.S. 831, the three-judge court made a similar point in these words:

> The tortuous lines which delineate the boundaries of many of the congressional districts under the proposed plan, the resulting lack of compactness and contiguity, and the failure to achieve equal representation for equal numbers of people as nearly as is practicable compels us to hold that the congressional apportionment is constitutionally invalid.

The reasons for the lack of compactness in the present congressional districts in New York State are explored in more detail in part III of this brief. Here no more

is necessary than to apply a visual test, noting, for example, the interlocking embrace of the sixth and eighth districts in Queens County and the one-county deep, two-hundred-mile-long reach of the thirty-fifth district, stretching across almost two-thirds the length of the State. Witnesses for the State have contended that the district is congruent with the Mohawk Valley. But half of the eight counties in the district are not remotely part of the Mohawk Valley.

III.

Gerrymandering violates Article I, Section 2 of the Constitution and the Fourteenth Amendment.

Once the equal-population principle is accepted as the basic postulate for legislative apportionment and congressional districting, the hardest remaining intellectual and constitutional problem is to determine how to identify and how to eliminate the discrimination caused by gerrymandering.* It is perfectly apparent that the salutary effect of the equal-population principle can be seriously undercut if no restriction is imposed upon the way in which equality of population among election districts is achieved. Population equality cannot by itself assure fairness of the districting process.

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* Appellee's motion to affirm filed in this Court in response to the appellant's jurisdictional statement suggests at pages 11-12 that the claim of gerrymandering is not a justiciable issue, citing *WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916, 925-26 (S.D.N.Y.), *aff'd*, 382 U.S. 4; *Badgley* v. *Hare*, 377 Mich. 396, 140 N.W.2d 436, *appeal dismissed for want of a substantial federal question*, 385 U.S. 114; *Bush* v. *Martin*, 251 F. Supp. 484, 513 (S.D. Tex.); *Sincock* v. *Gately*, 262 F. Supp. 739, 831-33; *Jones* v. *Falcey*, 48 N.J. 25, 222 A.2d 101, 105. This, however, overreads the meaning of the *per curiam* affirmance in *WMCA* and the dismissal in *Badgley* by this Court. In other cases in this Court, discussed below, although the merits of the gerrymander were not reached, the opinions were certainly premised on the assumption that the issue was federal judicial business. See *Wright* v. *Rockefeller*, 376 U.S. 52; *Fortson* v. *Dorsey*, 379 U.S. 433; *Burns* v. *Richardson*, 384 U.S. 73. *Cf. Gomillion* v. *Lightfoot*, 364 U.S. 339.

Appellant's argument on this point will proceed as follows. After a definition of gerrymandering the constitutional argument will be analyzed. Next will come a discussion of the nature of the proof needed to demonstrate the existence of a forbidden gerrymander, and finally the application of these principles to the present appeal.

A. Gerrymandering is the device by which election districts are constructed to enlarge or diminish the voting strength of a political party or group identified in common by race, ethnic background, or some other socioeconomic grouping of interest.

To define gerrymandering, even in such neutral terms as above, is to reveal that it is antithetical to a system of representative government. It should accordingly be possible to reach a consensus on the proposition that, apart from malapportionment itself (which is a kind of population gerrymander), the gerrymander is the device currently most destructive of fairness in the electoral process. Nor are malapportionment and gerrymandering unrelated. Even though the equal-population principle does not of its own force forbid gerrymandering, malapportionment and gerrymandering are nonetheless of the same family. Both arise out of the instinct for partisan advantage in defiance of the democratic ideal.

The techniques of gerrymandering are well understood. Whether the purpose is discrimination against or in favor of a political party or members of any other identifiable group, the methods are those described by Andrew Hacker in his study, *Congressional Districting*, 55 (rev. ed. 1964):

> If the aim of gerrymandering is for one party to obtain the maximum voting advantage at the other's expense, there are several methods by which this can be done. In each, the gerrymandering party

(henceforward to be called Party A) intends to make the votes of the opposition (Party B) as ineffective as possible. One method is for Party A to set up a district in which Party B will have "excess" votes—that is, considerably more votes will be cast for Party B's candidate than he needs to win. A second method is to create a district where Party B's "wasted" votes—those cast for a predictable loser—will be increased. And the third [now forbidden by the equal-population principle] is to design a district so that Party A's "effective" votes will be increased—usually by putting its own known followers into small districts compared to much larger districts for Party B's known followers.

B. Article I, Section 2 of the Constitution and the Fourteenth Amendment forbid gerrymandering.

This Court has rejected "[r]acially based gerrymandering," at least when it results "in denying to some citizens their right to vote . . . . ." *Reynolds* v. *Sims,* 377 U.S. at 555, citing *Gomillion* v. *Lightfoot,* 364 U.S. 339. Although that case was regarded by a majority of this Court as a Fifteenth Amendment case because of the complete denial of voting rights on grounds of race, it is not logical that intentional and systematic dilution of voting rights by reason of race should be any more permissible than dilution of voting rights "based solely on geographical considerations." *Reynolds* v. *Sims,* 377 U.S. at 580. Similarly, since "neither history alone, nor economics or other sorts of group interests" (*id.* at 579-80) are permissible bases for the limitation of voting rights, it follows that gerrymandering for any of these purposes is likewise forbidden.

Nevertheless, the State asserts, as it must if it is to defend the present congressional districting act, that partisan preferment is permissible. (For details of the State's argument, see section D below.) The argument appears to

be that the power should be given to the line drawers of the State to determine the allocation of congressional seats to each party. The State's announced purpose seems benign, to assure minority party representation; but even if this were constitutionally permissible under an even-handed administration, which appellant denies, no way is suggested of checking on those who wield this vast authority. If both houses of a state legislature are controlled by a single party, which has usualy been the case in New York as in most other states, the suggested rule would impose no restraint upon the dominant party except the uncertain recourse of appeal to the voters, a majority of whom would presumably be of the same political affiliation as the controlling legislative majority. It simply won't do.

It is scarcely more acceptable to argue that, because control of the New York Legislature was divided when the 1968 statute was enacted, each house provides a sufficient check upon the other to prevent egregious abuse by either. Even if that should be so, the more likely result, which appellant contends in Section D below was the case in New York, the likelihood of a bipartisan agreement is increased, whereby each party is assured its "safe" districts in exchange for like assurance in return. But what of the voters thus deprived of an opportunity to make their votes count in any meaningful way after the result is cynically prearranged by legislative leaders who in this respect serve their own advantage before that of the public?

It is no answer to say that voters who voted for a losing candidate in any election are to that extent always unrepresented. The difference is that where the result of election contests is predetermined by legislative agreement, bipartisan or otherwise, the decision-making authority is wrested from the voters in arbitrary and invidious fashion.

Surely the partisan gerrymander cannot be held constitutional; it violates the equal protection clause in creating

arbitrary classifications for the exercise of the franchise. Similarly, to the extent that fair and equal representation is the meaning of Article I, Section 2's provision for election of Representatives "by the People of the several States," the same principle should flow from that clause as well. Accordingly, congressional districting, like other forms of legislative election districting, must be freed of the burden of the gerrymander, whether used for partisan, racial, ethnic, or socioeconomic purposes.

C. The forbidden gerrymander is established upon a showing of district line drawing that systematically discriminates against or in favor of any group identified by interests shared in common.

The hard question is to determine how much proof, and what kind of proof, is necessary to establish a forbidden gerrymander. To date no case has been presented to this Court in which sufficient proof of gerrymandering was offered to persuade the Court that it was actionable. But there is no indication of unwillingness to act in a proper case.

This Court has expressed its views on the proof necessary to establish a vote-diluting gerrymander, as opposed to a vote-denying gerrymander in only one case in which there was a written opinion, *Wright* v. *Rockefeller*, 376 U.S. 52. In *Fortson* v. *Dorsey*, 379 U.S. 433, and *Burns* v. *Richardson*, 384 U.S. 73, gerrymandering was inferentially condemned, but in none of these cases was the constitutional question reached.

Wright v. *Rockefeller* did not directly raise the issue of gerrymandering for partisan advantage. Plaintiffs in that case had alleged that New York's 1961 congressional districting statute "segregates eligible voters by race and place of origin" in New York County. 376 U.S. at 53. The complaint alleged:

> The 18th, 19th and 20th Congressional Districts have been drawn so as to include the overwhelming number of nonwhite citizens and citizens of Puerto Rican origin in the County of New York. *Id.* at 54.

The case was tried before a three-judge court whose members read the evidence in as many ways, although two voted to dismiss the complaint. *Wright* v. *Rockefeller*, 221 F. Supp. 460 (S.D.N.Y.). Judge Moore concluded that there was no proof that the boundaries were drawn on racial lines. Judge Feinberg, believing the case closer, stated that plaintiffs' evidence might justify an inference that racial considerations motivated the reapportionment, but concluded that plaintiffs had not met the requisite burden of proof. Judge Murphy, dissenting, concluded that the statistical evidence demonstrated that Negroes and Puerto Ricans were fenced out of the seventeenth district, thus establishing a *prima facie* case of legislative intent to discriminate on racial lines.

This Court affirmed the dismissal because "appellants have not shown that the challenged part of the New York Act was the product of a state contrivance to segregate on the basis of race or place of origin." *Id.* at 58. Mr. Justice Harlan concurred on the explicit premise that "the only issue in this case involves racially segregated districts." *Ibid.* Justices Douglas and Goldberg, dissenting, also believed that the charge of racial gerrymandering was established.

The inference from *Wright* (and *Honeywood* v. *Rockefeller*, 214 F. Supp. 897 (E.D.N.Y.), *aff'd*, 376 U.S. 222) is that racial gerrymandering will be invalidated upon sufficient proof. There was also in *Wright* an incipient issue of partisan gerrymandering, based on the same facts; but plaintiffs did not push the claim. In that case an argument could have been made that the irregularities in

the district boundaries were designed primarily for political advantage rather than essentially to achieve racially discriminatory objectives. In light of the well-known patterns of residential segregation in Manhattan, it could have been argued that political advantage was sought in one of two ways: (1) It might have been contended that, by concentrating Negro and Puerto Rican voters in one district, the aim was to assure at least one Representative from one of those racial or national-origin groups; or (2) it might have been a straight partisan gerrymander, in which the lines were drawn to exclude Negroes and Puerto Ricans from one district and to concentrate them in another on the assumption that, as a class, they were more likely to vote for one party than another. This would square exactly with the classic theory of gerrymander in terms of "excess" votes and "wasted" votes, as described above at pages 29-30.

In *Fortson* v. *Dorsey*, 379 U.S. 433, this Court suggested that, with sufficient proof of discrimination, a gerrymander could be invalidated. The issue in that case related to the validity on its face of a Georgia statute providing for multi-member constituencies in the state's seven most populous counties. In concluding that the statute was not invalid on its face this Court observed that a comparable provision "under the circumstances of a particular case, [might] operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* at 439. Upon such a demonstration it was said to be "time enough to consider whether the system still passes constitutional muster." *Ibid.* See also *Burns* v. *Richardson*, 384 U.S. 73, 88. *Cf. Connor* v. *Johnson*, 265 F. Supp. 492 (S.D. Miss.), *aff'd*, 386 U.S. 483, in which a claim of racial gerrymandering in the congressional districting in Mississippi was held not established on the record.

The question is accordingly yet unanswered: What proof is needed to secure the only answer to the constitutional question that appellant thinks possible? The problem may lie in the fact that two presumptions are likely to collide in such cases. On the one hand is the presumption of constitutional validity that undergirds all state legislative acts. On the other hand is the requirement that has now been made plain in these cases that the burden rests on the State to explain population deviations that are more than *de minimis*. In these cases, where the issue involves the integrity of the franchise, which is "a fundamental political right, because preservative of all rights," *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370, the ordinary presumption of validity must yield to the State's obligation to explain.

D. The circumstances surrounding the 1968 New York congressional districting act show a systematic and intentional partisan gerrymander.

Appellant believes that the present appeal is exactly the kind of case discussed above, that is, one in which rational justification is lacking as to the range of population deviations among the districts (more than 14 per cent from least populous to most populous), and the individual deviations that could have been cured but were not. The State's principal justification is worse than none, for it confirms what otherwise was inferable, but not explicitly on the record, namely, balancing of political representation in the House of Representatives.

The issue of partisan gerrymandering is sharply drawn, appellant thinks inescapably so, in the present case. Even apart from the unexplained or ill-explained population inequalities, the fact of the political gerrymander is insisted upon by the State's own witnesses who parade the political motivation behind the line drawing and defend its validity. Here are several items from the hearing before the three-judge court below. The speaker is the State's witness,

Donald Zimmerman, then counsel to the majority leader and temporary president of the New York State Senate:

> The fact is, your Honors, as you well know, every line drawn on a map has political impact, and the only person who can say that he is drawing a line and he doesn't know what the political impact of his line is is, of course, an idiot (A. 120).
>
> * * * * *
>
> It is in the essence of the very nature of a districting and reapportionment plan to ascribe and to segregate and apportion political power. This is the heart of it (A. 120).
>
> * * * * *
>
> So that the Legislature had before it the rational policy of making the districts in Queens County representative, and introducing an element of proportionality in the formation of the districts . . . . (A. 122-23).
>
> * * * * *
>
> . . . . There is no reason why in a county which will have four Congressmen the Legislature cannot apportion in a manner so as to give some recognition—some, not even proportional, mind you, but some recoghition to a minority which captures 43 per cent of the vote (A. 123).
>
> * * * * *
>
> . . . . It is a rational policy for a state in a multi-district county to design the districts so as to provide the minority with some representation. I am prepared to stand on that in this court or in any other court (A. 123).

The examples given by Mr. Zimmerman, a Republican, are illuminating. He worries at some length about the need to preserve three Republican congressional districts in New York City (why not two or four?), but appears to

be unconcerned by the fact that the City of Rochester and its environs are represented by two Republicans instead of one Republican and one Democrat, as would probably have been the case if Rochester had been left as a unit instead of divided down the middle.

The clearly political motivations which determined the placement of the boundary line between the sixth and eighth congressional districts in Queens County are strikingly revealed by the figures below.

Under the redistricting statute of February 1968 the boundary between these two districts remained unaltered from what it had been under the 1961 statute (although the districts were altered in 1968 as they touched other districts). Therefore, the figures used below relate to election figures from the year 1960—the last election prior to the 1961 redistricting.

The sixth congressional district is strongly Republican; the eighth is overwhelmingly Democratic. Examination of the peculiarly corrugated line which separates these two districts reveals that the boundary does not follow any "natural" or logical route whatsoever. The motivations which determined the boundary become readily apparent, however, when one examines the political character of the areas immediately adjacent to the boundary line: the boundary was clearly located where it was in order to take advantage of the sharp contrast in the political pattern on one side of the line as against that on the other.

In compiling the figures below, only those of the 1960 election districts which touch the present congressional district boundary line and which are now located wholly within one congressional district or the other were included. Those few election districts which are divided by the present congressional district boundary were excluded because no election results on any basis smaller than election districts exist. (Election districts in New York City generally consist of one or a few city blocks.)

The figures are as follows:

> In those election districts which are within the present sixth congressional district and are located directly along the boundary of the present eighth congressional district, Republican candidates polled 59.5 per cent of the votes in 1960; Democratic candidates won 40.5 per cent. By contrast, just across the line in those election districts now within the eighth congressional district which directly touch the boundary of the present sixth district, the Republican percentage was 43.3 and the Democratic was 56.7. There was thus a difference of fully 16.2 percentage points between areas separated only by the width of a street.

It should be noted that these figures relate only to the *border* areas of the two districts. The contrast is even greater for the districts as a whole, but it is the contrast along the boundary line which is particularly revealing, for it provides unmistakable evidence of the fact that the line was located in such a way as to take maximum advantage of as many points as possible in eastern Queens where a sharp difference in the voting pattern existed between directly adjacent areas.

If political balance is genuinely sought in legislative representation, the state should be urged to adopt a system of proportional representation, which is still available to those who favor "proportionality" as Mr. Zimmerman describes it. But it is quite another thing to allow a politically chosen body, whether a legislature or its appointed reapportionment commission, to make decisions for the voters as to how they shall be combined into election districts in order to prepackage the results as far as possible. If this is the low repair to which the election process has fallen, it is due for a change.

The discrimination against the voters left indefinitely without chance of an effective ballot is apparent and cries out for remedy in terms of equality restored and fairness regained in the representation scheme. Appellant believes this aspect of the present appeal, even without the strong support given his claim by the unexplained inequalities, justifies reversal of the judgment below to forbid further use of the present plan.

CONCLUSION

For the reasons stated above the judgment of the court below should be reversed and the case remanded to the district court with a direction to enjoin further use of the 1968 congressional districting act of the State of New York, and to ask that jurisdiction be there retained until a valid statute has been enacted.

Respectfully submitted,

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Respectfully submitted,

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Appendix A

Population of New York Congressional Districts (1968) and Percentage Deviations From Average

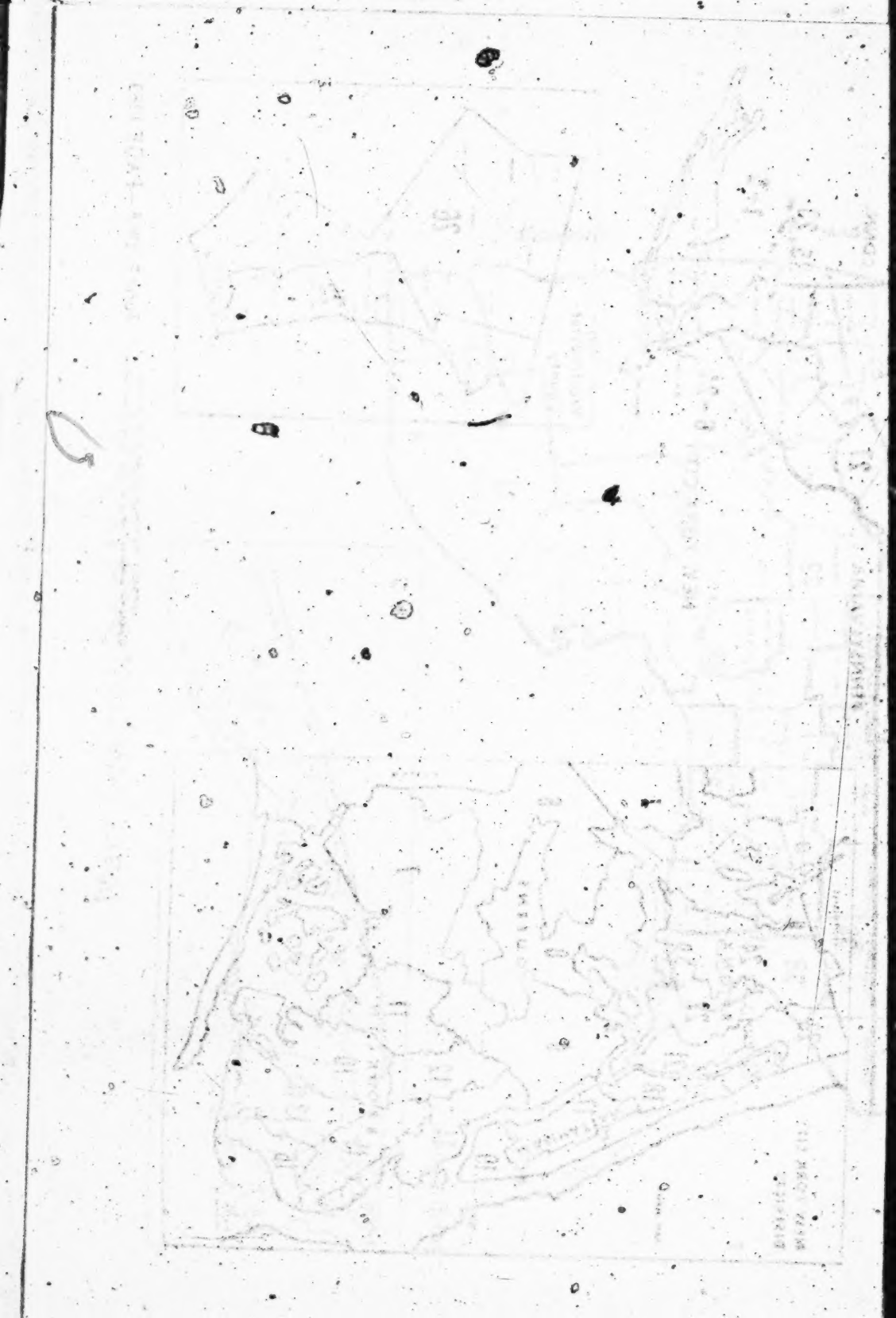
1st C.D.	393,585	—3.8
2nd C.D.	393,465	—3.9
3rd C.D.	393,434	—3.9
4th C.D.	393,183	—3.9
5th C.D.	393,288	—3.9
6th C.D.	434,615	+6.2
7th C.D.	434,750	+6.2
8th C.D.	434,552	+6.2
9th C.D.	434,770	+6.2
10th C.D.	417,122	+1.9
11th C.D.	417,090	+1.9
12th C.D.	417,298	+1.9
13th C.D.	417,040	+1.9
14th C.D.	417,080	+1.9
15th C.D.	417,093	+1.9
16th C.D.	417,478	+2.0
17th C.D.	390,742	—4.5
18th C.D.	390,861	—4.5
19th C.D.	390,023	—4.7
20th C.D.	390,363	—4.6
21st C.D.	390,552	—4.6
22nd C.D.	390,492	—4.6

23rd	C.D.	390,228	—4.7
24th	C.D.	390,057	—4.7
25th	C.D.	420,146	+2.6
26th	C.D.	420,467	+2.7
27th	C.D.	409,349	——
28th	C.D.	396,122	—3.2
29th	C.D.	425,822	+4.0
30th	C.D.	415,030	+1.4
31st	C.D.	425,905	+4.1
32nd	C.D.	385,406	—5.8
33rd	C.D.	415,333	+1.5
34th	C.D.	423,028	+3.3
35th	C.D.	386,148	—5.7
36th	C.D.	410,943	+ .4
37th	C.D.	410,432	+ .3
38th	C.D.	382,277	—6.6
39th	C.D.	435,393	+6.4
40th	C.D.	435,684	+6.4
41st	C.D.	435,880	+6.5

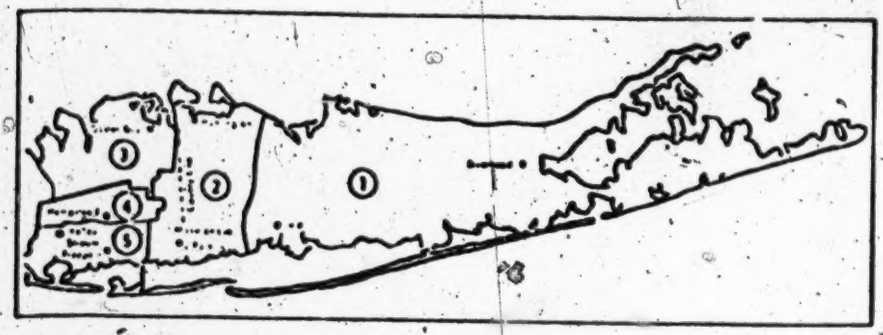
maximum deviation: 6.6%

average deviation: 3.8%

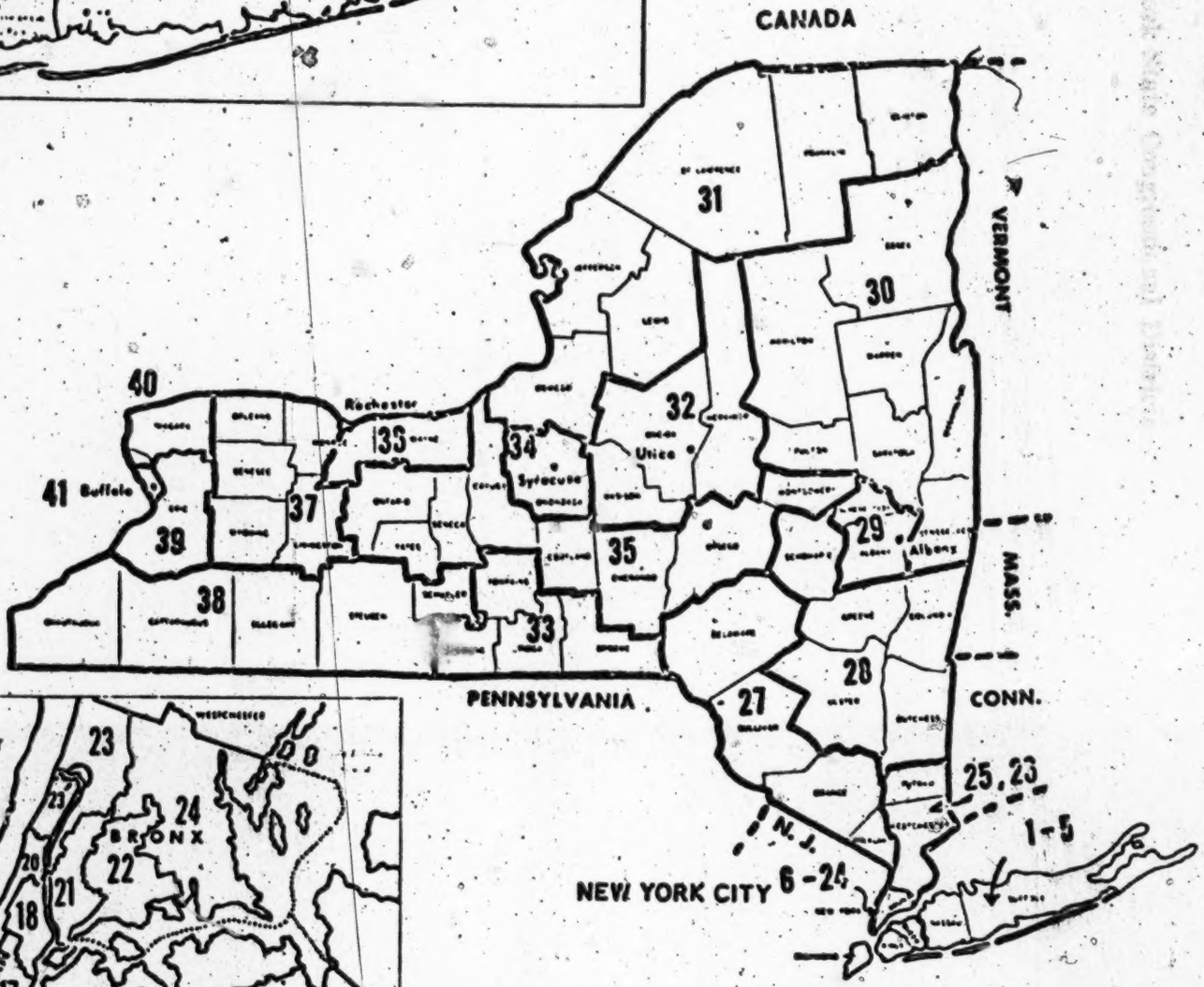
smallest to largest: 14.0%

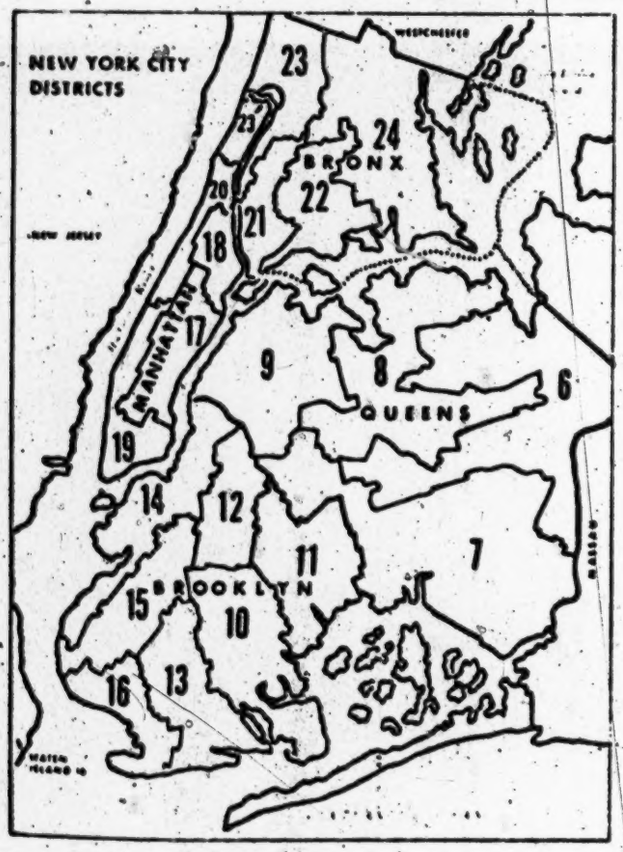


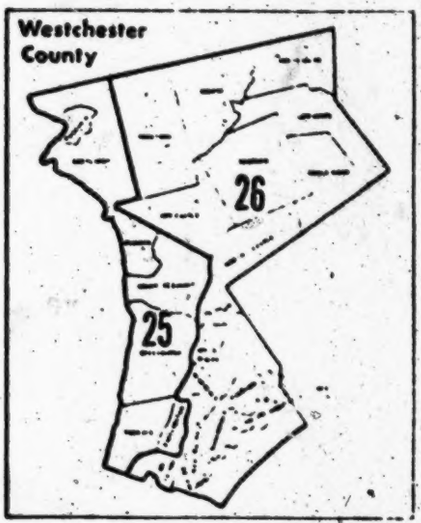
New Congressional Districts



Long Island







Appendix C

Population Disparities Among Congressional Districts, by States, as of Late April, 1968

(Photoprint)

[For the convenience of Court and Counsel this Exhibit is bound in on the opposite page.]

POPULATION DISPARITIES AMONG CONGRESSIONAL DISTRICTS, BY STATES, AS OF LATE APRIL, 1968

STATE	MAXIMUM PERCENTAGE VARIATION FROM STATE'S AVERAGE DISTRICT POPULATION	AVERAGE PERCENTAGE VARIATION FROM STATE AVERAGE	PERCENTAGE BY WHICH POPULATION OF MOST POPULOUS DISTRICT EXCEEDS THAT OF LEAST POPULOUS	POPULATION DIFFERENCE BETWEEN MOST- AND LEAST-POPULOUS DISTRICTS	RATIO BETWEEN POPULATIONS OF MOST- AND LEAST-POPULOUS DISTRICTS
West Virginia*	1.0%	.6%	1.9%	6,970	1.0 to 1
Massachusetts*	1.1%	.5%	2.1%	8,717	1.0 to 1
Ohio*	1.4%	.7%	2.4%	9,881	1.0 to 1
Maryland*	1.5%	.6%	2.6%	9,973	1.0 to 1
Utah*	1.5%	1.5%	3.0%	13,101	1.0 to 1
Indiana*	1.6%	.7%	2.6%	11,039	1.0 to 1
Arkansas*	1.6%	.8%	2.2%	9,675	1.0 to 1
North Carolina*	2.0%	1.1%	4.1%	16,636	1.0 to 1
Michigan*	2.1%	1.1%	3.4%	13,789	1.0 to 1
Oklahoma*	2.1%	1.9%	4.1%	15,457	1.0 to 1
Tennessee*	2.2%	1.2%	4.3%	16,728	1.0 to 1
Missouri*	2.4%	1.4%	4.4%	18,487	1.0 to 1
Montana*	3.1%	3.1%	6.3%	20,635	1.1 to 1
Mississippi*	3.2%	2.5%	7.1%	26,265	1.1 to 1
Wisconsin	3.4%	1.5%	7.0%	26,847	1.1 to 1
South Dakota*	3.4%	3.4%	7.1%	23,288	1.1 to 1
Maine	4.3%	4.3%	9.0%	41,665	1.1 to 1

STATE	MAXIMUM PERCENTAGE VARIATION FROM STATE'S AVERAGE DISTRICT POPULATION	AVERAGE PERCENTAGE VARIATION FROM STATE AVERAGE	PERCENTAGE BY WHICH POPULATION OF MOST POPULOUS DISTRICT EXCEEDS THAT OF LEAST POPULOUS	POPULATION DIFFERENCE BETWEEN MOST- AND LEAST-POPULOUS DISTRICTS	RATIO BETWEEN POPULATIONS OF MOST- AND LEAST-POPULOUS DISTRICTS
West Virginia*	1.0%	.6%	1.9%	6,970	1.0 to 1
Massachusetts*	1.1%	.5%	2.1%	8,717	1.0 to 1
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Montana*	3.1%	3.1%	6.3%	20,635	1.1 to 1
Mississippi*	3.2%	2.5%	7.1%	26,265	1.1 to 1
Wisconsin	3.4%	1.5%	7.0%	26,847	1.1 to 1
South Dakota*	3.4%	3.4%	7.1%	23,288	1.1 to 1
Maine	4.3%	4.3%	9.0%	41,665	1.1 to 1
New Mexico*	5.3%	5.3%	11.3%	50,695	1.1 to 1
North Dakota	5.4%	5.4%	11.4%	34,134	1.1 to 1
Kentucky*	5.5%	2.5%	7.0%	40,144	1.1 to 1
Virginia*	5.8%	3.3%	11.2%	42,131	1.1 to 1
South Carolina*	6.1%	3.7%	12.2%	45,922	1.1 to 1
New York*	6.6%	3.8%	14.0%	53,603	1.1 to 1
Arizona*	6.6%	4.4%	12.7%	51,312	1.1 to 1
Rhode Island	6.9%	6.9%	14.7%	58,990	1.1 to 1
New Jersey*	7.3%	3.3%	15.5%	57,978	1.2 to 1
Illinois*	7.5%	3.4%	14.5%	57,056	1.1 to 1
California*	8.1%	3.2%	11.3%	54,218	1.1 to 1
Texas*	8.1%	3.8%	16.1%	62,559	1.2 to 1
Alabama*	8.4%	4.4%	15.4%	59,136	1.2 to 1
Oregon*	8.6%	4.3%	16.0%	64,644	1.2 to 1
Florida*	8.8%	2.4%	12.2%	48,824	1.1 to 1
New Hampshire	9.3%	9.3%	20.6%	56,715	1.2 to 1
Idaho*	9.4%	9.4%	20.8%	62,777	1.2 to 1
Kansas*	9.6%	3.9%	15.2%	59,792	1.2 to 1
Nebraska*	11.8%	7.9%	22.3%	92,443	1.2 to 1
Iowa	12.3%	5.2%	25.3%	89,250	1.3 to 1
Colorado*	12.6%	6.4%	21.7%	87,988	1.2 to 1
Minnesota	13.2%	8.0%	28.6%	107,397	1.3 to 1
Washington*	13.3%	(b)	26.0%	91,709	1.3 to 1
Louisiana*	13.7%	7.8%	25.0%	92,622	1.3 to 1
Connecticut*	14.1%	4.7%	19.3%	77,934	1.2 to 1
Pennsylvania*	15.0%	5.2%	34.0%	125,470	1.3 to 1
Georgia*	16.4%	9.8%	38.2%	125,837	1.4 to 1

OTHER STATES: Alaska, Delaware, Nevada, Vermont and Wyoming have only one Representative each, elected on a state-wide basis; Hawaii has two Representatives both of whom are elected on a state-wide basis, but will be required to establish separate districts by 1970.

NOTES:

* - Asterisks indicate states which have been districted or redistricted since Wesberry v. Sanders decision of February 17, 1964. (Total to date: 37 states.)

(a) [redacted]

(b) - Information not yet available.

Appendix D

(Photoprint)

[For the convenience of Court and Counsel this Exhibit is bound in on the opposite page.]

APPENDIX D

A POSSIBLE ARRANGEMENT OF NEW YORK STATE CONGRESSIONAL DISTRICTS UNDER WHICH NO DISTRICT WOULD DEVIATE IN POPULATION BY MORE THAN 4.7% FROM STATE AVERAGE

	UNDER THIS PLAN	UNDER 1968 ACT
MOST POPULOUS DISTRICT:	423,687	435,880
DEVIATION FROM STATE AVERAGE:	+3.5%	+6.5%
LEAST POPULOUS DISTRICT:	390,204	382,277
DEVIATION FROM STATE AVERAGE:	-4.7%	-6.6%
AVERAGE VARIATION FROM STATE AVERAGE:	3.0%	3.8%
PERCENTAGE DEVIATION FROM SMALLEST TO LARGEST	8.6%	14.0%
POPULATION DIFFERENCE BETWEEN MOST AND LEAST POPULOUS DISTRICTS:	33,483	53,603
MINIMUM PERCENTAGE OF STATE POPULATION WHICH CAN BE REPRESENTED BY MAJORITY OF CONGRESSIONAL ~~DISTRICT~~ DELEGATION:	49.8%	49.3%

APPENDIX D

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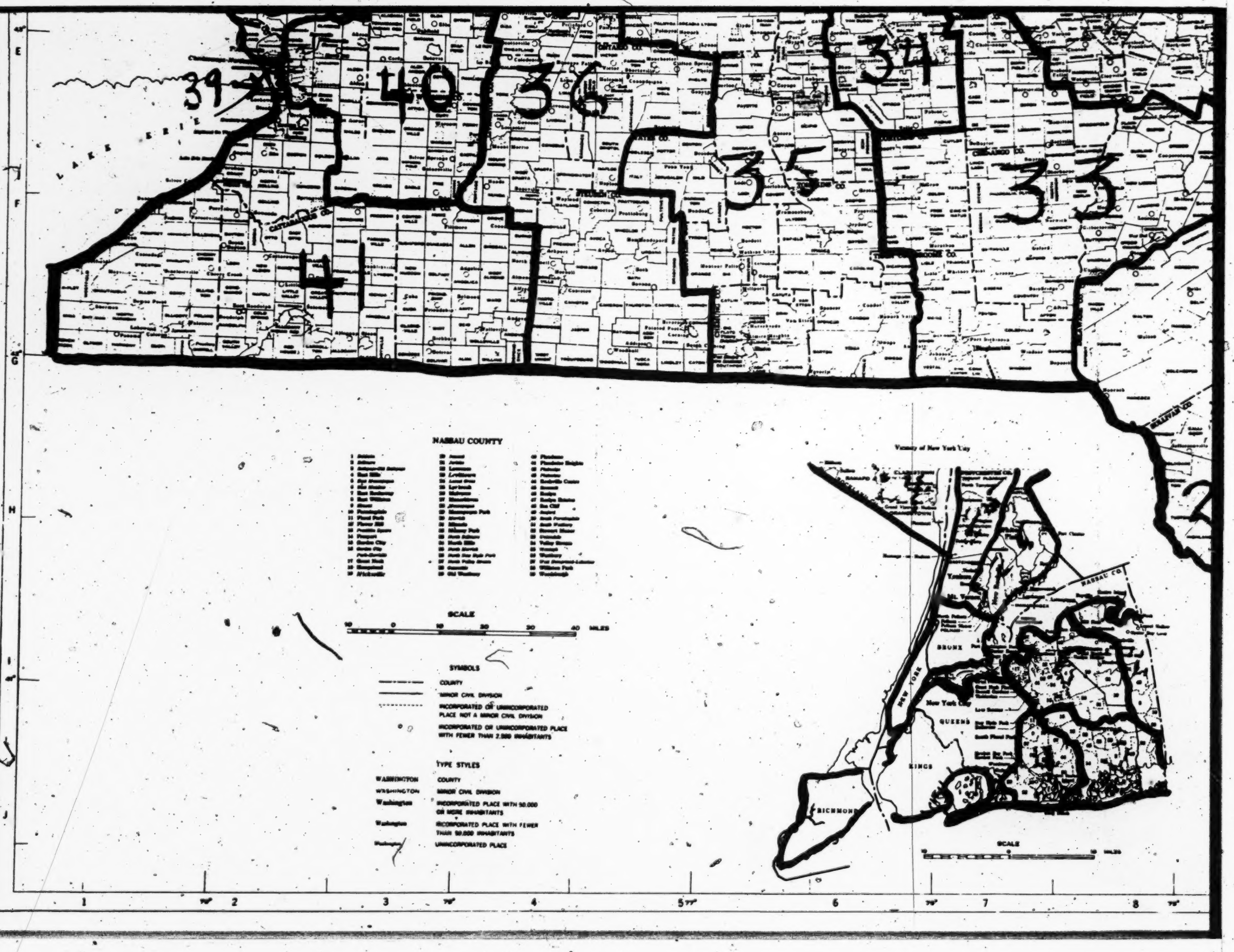
MINIMUM PERCENTAGE OF STATE POPULATION WHICH CAN BE REPRESENTED BY MAJORITY OF CONGRESSIONAL ~~DISTRICT~~ DELEGATION:	49.8%	49.3%

Congressional District	Population ~~Area~~
1 C.D.	398,254
2nd C.D.	392,518
3rd C.D.	391,986
4th C.D.	391,377
5th C.D.	392,820
6th C.D.	423,525
7th C.D.	423,610
8th C.D.	423,539
9th C.D.	423,553
10th C.D.	423,467
11th C.D.	423,557
12th C.D.	423,398
13th C.D.	423,687
14th C.D.	423,541
15th C.D.	423,529
16th C.D.	423,482
17th C.D.	390,432
18th C.D.	390,338
19th C.D.	390,204
20th C.D.	390,4[illegible]48


39
40
36
35
34
33
LAKE ERIE
CATTARAUGUS CO.
ONTARIO CO.
YATES CO.
STEUBEN CO.
CHEMUNG CO.
WAYNE CO.
NASSAU COUNTY
SCALE
10 0 10 20 30 40 MILES
SYMBOLS
COUNTY
MINOR CIVIL DIVISION
INCORPORATED OR UNINCORPORATED PLACE NOT A MINOR CIVIL DIVISION
INCORPORATED OR UNINCORPORATED PLACE WITH FEWER THAN 2,500 INHABITANTS
TYPE STYLES
WASHINGTON COUNTY
WASHINGTON MINOR CIVIL DIVISION
Washington INCORPORATED PLACE WITH 50,000 OR MORE INHABITANTS
Washington INCORPORATED PLACE WITH FEWER THAN 50,000 INHABITANTS
UNINCORPORATED PLACE
Vicinity of New York City
NASSAU CO.
BRONX
NEW YORK
New York City
QUEENS
KINGS
RICHMOND
SCALE
E
F
G
H
I
J
1
2
3
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5
6
7
8
79°

Congressional District	Area
21st C.D.	390,467
22nd C.D.	390,353
23rd C.D.	390,423
24th C.D.	390,457
25th C.D.	404,011
26th C.D.	404,880
27th C.D.	409,349
28th C.D.	405,308
29th C.D.	415,511
30th C.D.	421,628
31st C.D.	419,089
32nd C.D.	421,156
33rd C.D.	403,594
34th C.D.	423,028
35th C.D.	410,245
36th C.D.	415,137
37th C.D.	415,163
38th C.D.	416,243
39th C.D.	416,447
40th C.D.	416,284
41st C.D.	416,312

* For districts 1, 25 through 37, and 41, population figures are exact and accurate. For districts 2 through 24 and 38 through 40, actual population may vary very slightly from figure shown, but in no case would difference be more than a few hundred.

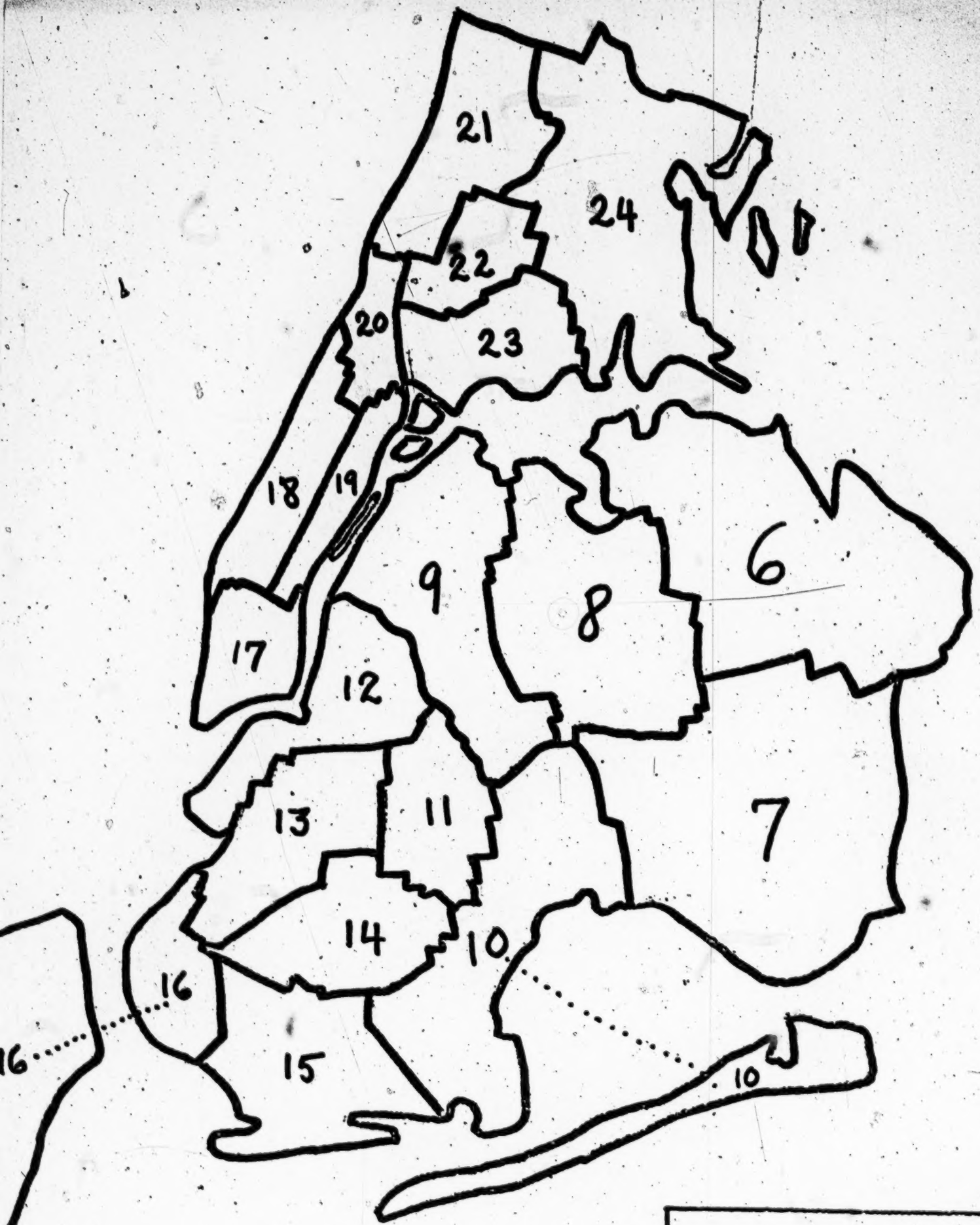
Appendix E

Appellant's Suggested Plan

(New York City)

(Photoprint)

[For the convenience of Court and Counsel this Exhibit is bound in on the opposite page.]



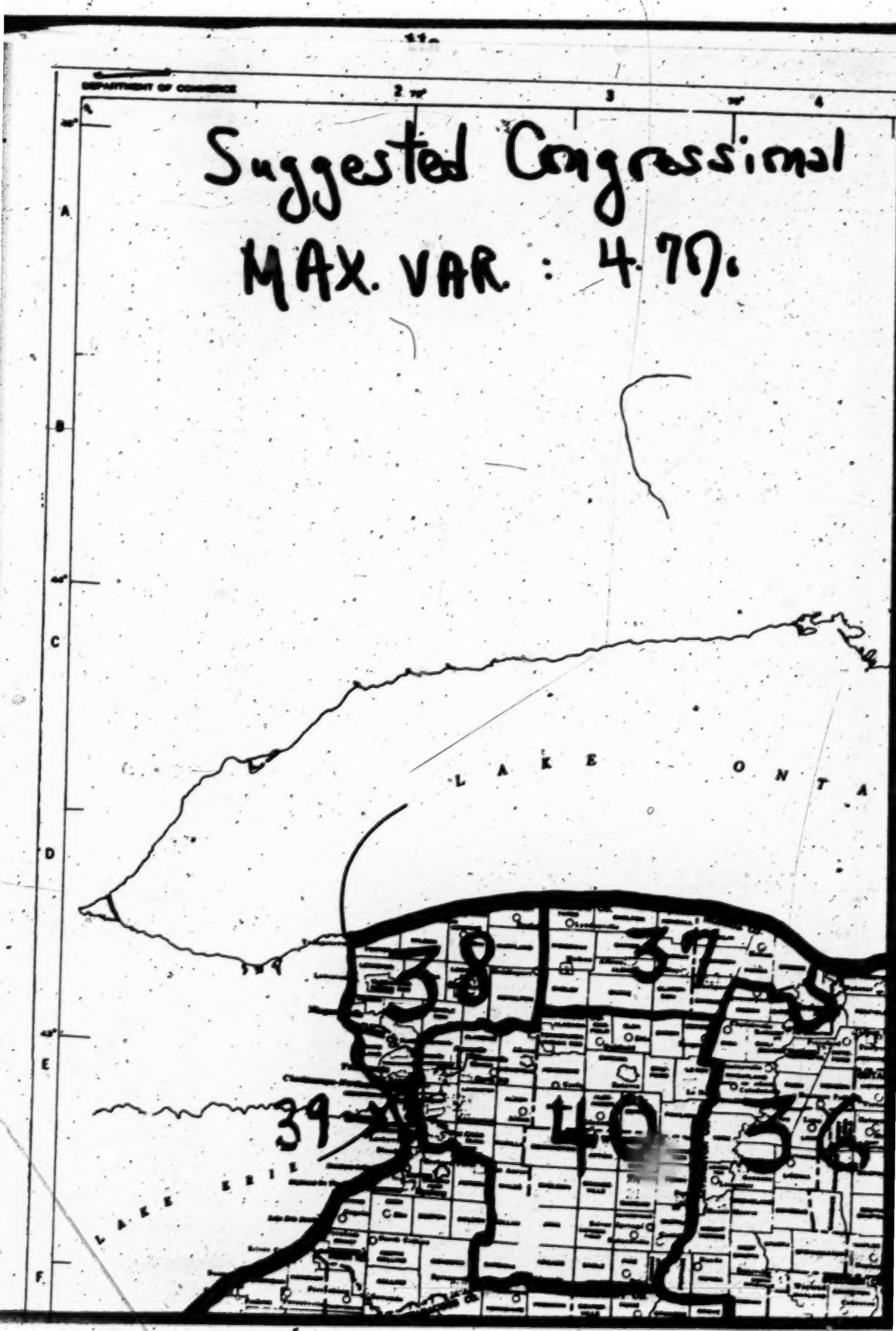
NEW YORK CITY DISTRICTS
UNDER PLAINTIFF'S PLAN

Appendix F

Appellant's Suggested Plan

(Outside New York City)

[For the convenience of Court and Counsel this Exhibit is bound in on the opposite page.]


Suggested Congressional
MAX. VAR : 4.7%
LAKE ONTARIO
LAKE ERIE
38
37
39
40
36

ested Congressional Districts --

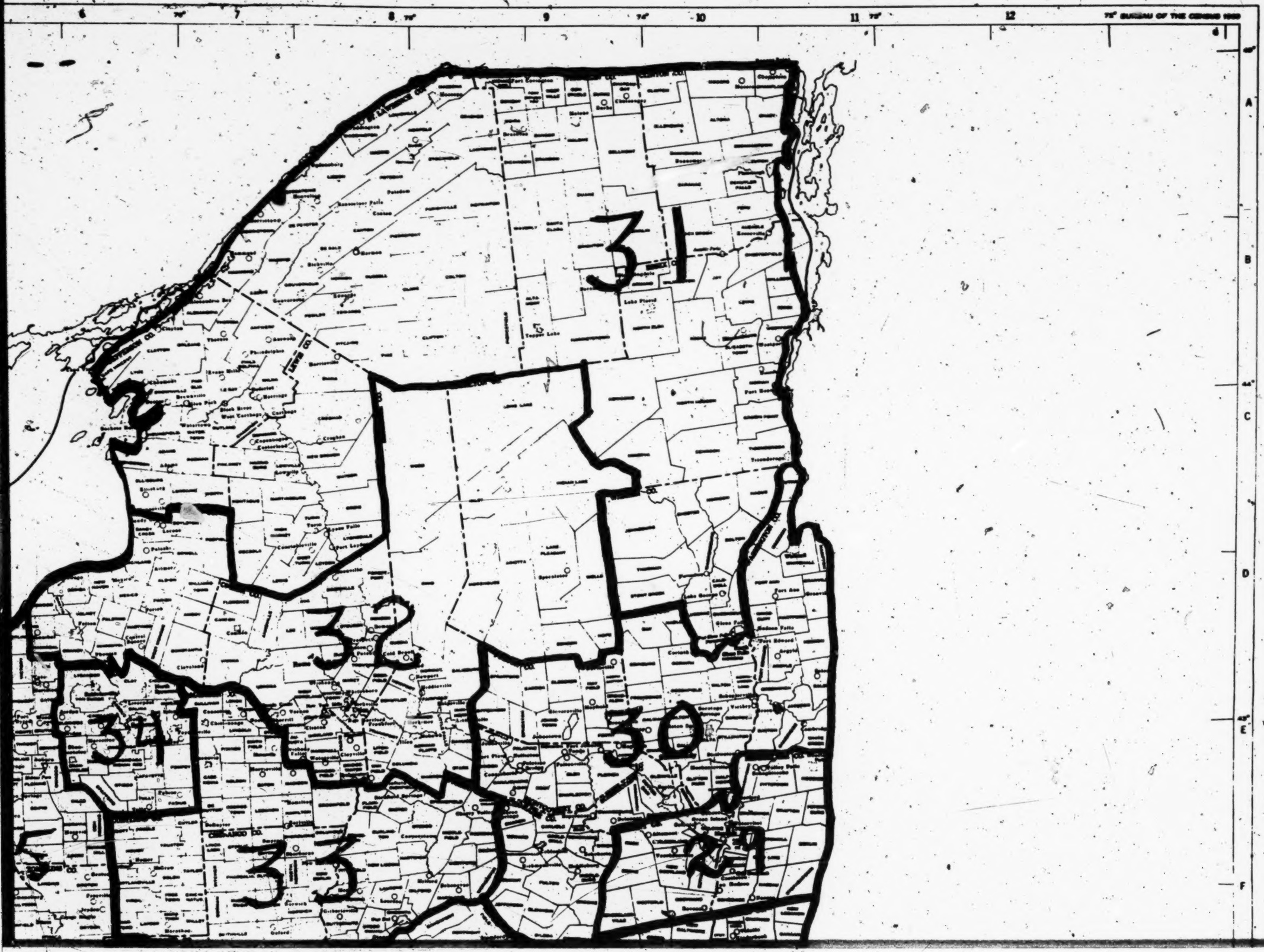
R. VAR. : 4.79.

LAKE ONTARIO

38 37 39 31

40 36 34 30

35 33 32


6
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12
A
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C
D
E
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31
32
34
33
30
29

40 36 34 30

35 33 29

28

29

26

NASSAU COUNTY

SCALE

0 10 20 30 40 MILES

SYMBOLS

COUNTY

MINOR CIVIL DIVISION

INCORPORATED OR UNINCORPORATED PLACE NOT A MINOR CIVIL DIVISION

INCORPORATED OR UNINCORPORATED PLACE WITH FEWER THAN 2,500 INHABITANTS

TYPE STYLES

WASHINGTON — COUNTY

WASHINGTON — MINOR CIVIL DIVISION

Washington — INCORPORATED PLACE WITH 50,000 OR MORE INHABITANTS

Washington — INCORPORATED PLACE WITH FEWER THAN 50,000 INHABITANTS

Washington — UNINCORPORATED PLACE

Vicinity of New York City

NASSAU CO.

BRONX

NEW YORK

QUEENS

KINGS

RICHMOND

SCALE

3 4 5 6 7 8 9 10

34

30

33

29

28

29

26

SUFFOLK COUNTY

Vicinity of New York City

NASSAU CO.

ORANGE CO.

PUTNAM CO.

BRONX

NEW YORK

New York Co.

QUEENS

KINGS

RICHMOND

SCALE

6 7 8 9 10 11 12 13

APPELLEES' BRIEF

Supreme Court of the United States

OCTOBER TERM, 1968, NO. 238

DAVID I. WELLS,

Appellant,

against

NELSON A. ROCKEFELLER, as Governor of the State of New York, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, JOHN P. LOMENZO, as Secretary of the State of New York, MALCOLM WILSON, as Lieutenant Governor of the State of New York, and Presiding Officer of the Senate of the State of New York, and ANTHONY J. TRAVIA, as Speaker and Presiding Officer of the Assembly of the State of New York,

Appellees.

BRIEF FOR APPELLEES

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INDEX

TABLE OF CITATIONS

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Appellees.

BRIEF FOR APPELLEES

Statement

The present action was filed in the Southern District of New York on June 29, 1966 challenging the constitutionality of New York's 1961 Congressional Districting Act (L. 1961, ch. 980) as being violative of Article I, § 2 and the Fourteenth Amendment to the Constitution of the United States.

Although the 1961 Congressional Districting Act predated the decisions of this Court in *Baker* v. *Carr*, 369 U. S. 186, and *Wesberry* v. *Sanders*, 376 U. S. 1, the Joint Legislative Committee on Reapportionment of the New York Legislature recognized that in the drawing of congressional districts, "the most important standard is sub-

stantial equality of population." N. Y. Legis. Doc. No. 45 (1961), page 4. The Committee recommended that a maximum variation of 15 per cent from average population per district would "preserve substantial equality of population and permit consideration to be given to other important factors such as community of interest and the preservation of traditional associations." *Id.* at 4-5. It may be remembered that the maximum variation of 15 per cent from average population per district was the standard then recommended by the American Academy of Political Science and endorsed by former President Truman for the creation of congressional districts. *Ibid.*

In its opinion issued on May 10, 1967, the statutory three-judge Court declared that the standards followed by the New York Legislature in 1961 have become "outmoded" as a result of recent reapportionment decisions of this Court. Accordingly, the District Court held that "[o]n the basis of population inequality alone," the 1961 Act, with congressional districts ranging from 15.1% above average to 14.4% below average, "fails to meet constitutional standards." *Wells* v. *Rockefeller,* 273 F. Supp. 984, 989; A. 20, 30. In view of this conclusion, the Court did not deal with plaintiffs' other objections concerning alleged lack of compactness and so-called partisan gerrymandering, except to note that with respect to the latter point, no proof had been offered. 273 F. Supp. at 987; A. 25.

In determining an appropriate remedy, the District Court acknowledged that it might be preferable to defer requiring new congressional districts until the 1970 census since:

> "Accuracy would call for a decree which would be based upon the 1970 census, knowledge of the number of congressional seats, and the immediate enactment in 1971 of a constitutional Act based upon the Supreme Court mandates, which Act would apply to the 1972 election of congressmen and which would

> retain jurisdiction in this court as a forum before which the litigants could press alleged failures to proceed. * * *'' 273 F. Supp. at 991; A. 33.

However, the District Court interpreted the decisions of this Court in *Swann* v. *Adams*, 383 U. S. 210, 385 U. S. 440, as precluding such an extension.

In attempting to resolve this dilemma, the District Court directed the New York Legislature to enact into law a new congressional districting plan, effective no later than March 1, 1968, but at the same time, suggested a ''compromise'' solution, in the following words:

> ''* * * Acting upon the assumption that accurate congressional representation (1972-1982) must await the 1970 census and upon the Supreme Court's understandable objection to protracted delay, a compromise may be in order. The 1968 and 1970 (even possibly the 1972) congressional elections ought to be held in districts far more equalized than they are at present. There are enough changes which can be superimposed on the present districts to cure the most flagrant inequalities. * * *'' 273 F. Supp. at 992; A. 34.

The order of the District Court was affirmed, *per curiam* by this Court, Justice HARLAN dissenting, on December 18, 1967. 389 U. S. 421; A. 40-43.

With the suggested ''compromise'' of the District Court in mind, the 1968 Legislature drew new congressional districts for 29 of the State's 41 congressional districts. L. 1968, ch. 8. Since the United States Census Bureau advised State officials in the summer of 1967 that a new statewide census could not be completed before the fall of 1968 (A. 119), the Legislature was required to employ 1960 census figures as affording the only available statewide population figures. See Interim Report of the Joint Legislative Committee on Reapportionment, 1968, pp. 3-6; A. 55-58.

Following more than three months of work by the Joint Legislative Committee on Reapportionment in drafting the new congressional lines, the 1968 congressional districting bill (Senate No. 3988, Assembly No. 5780) was introduced in both Houses of the New York Legislature on February 20, 1968. The bill received overwhelming bi-partisan support in passing the Assembly by a vote of 126 to 19 and the Senate by a vote of 51 to 5 on February 26, 1968 and on that same day was signed into law by Governor Rockefeller as Chapter 8 of the Laws of 1968. *N. Y. Times,* Feb. 27, 1968, p. 1.

After examining the new congressional districts established by Chapter 8 and analyzing the rationale of the congressional districting plan as contained in the Interim Report of the Joint Legislative Committee on Reapportionment, *supra,* the Attorney General's brief, and as expounded at a court hearing on March 12, 1968 by representatives of the New York State Legislature (A. 110-140), the Court below found that the population disparities in the 1961 Act had been remedied and that the minor disparities in the 1968 Act were based on recogntion by the Legislature of the natural and historic division of the State into regions and by the desire to maintain county integrity where possible. 281 F. Supp. 821, A. 44-50. The Court concluded that the Legislature had produced a constitutionaly valid plan that "at least until the next census, will give the voters an opportunity to vote in the 1968 and 1970 elections on a basis of population equality within reasonably comparable districts." 281 F. Supp. at 826; A. 50.

The objections to the new congressional districts raised by various intervenors concerning the division of certain neighborhoods in Brooklyn and The Bronx were rejected by the Court which found such divisions to be a necessary result of the creation of new congressional districts based on equal population. In overruling the objections of plain-

tiffs and objectants, the District Court noted that "no proof has been submitted that the Legislature acted in contravention of the precepts of the Supreme Court with respect to congressional reapportionment * * *". 281 F. Supp. at 825; A. 50.

In its judgment entered on April 1, 1968, the District Court decreed that the congressional districting plan set forth in Chapter 8 of the Laws of 1968 was in compliance with its prior order of July 26, 1967 (which, *inter alia*, ordered that the drawing of new congressional districts not be based upon considerations of race, sex or economic status) and that Chapter 8 was in conformity with the requirements of the Constitution of the United States (A. 51-52). Plaintiff David I. Wells has appealed from this judgment. The other original plaintiff, Donald S. Harrington, who prosecuted this action both individually and as Chairman of the State Committee of the Liberal Party of the State of New York, has not joined in this appeal.

Questions Presented

1. Was the District Court correct in sustaining the constitutionality of New York's 1968 Congressional Districting Act where it found that the disparities in population among the former congressional districts which invalidated the 1961 Act have been remedied, and further found that the minor population disparities among the present districts are based upon rational considerations given by the New York Legislature to the integrity of county and election district lines and to natural and historical regional divisions within the State?

2. Was the District Court required to adopt, in preference to the congressional districting plan enacted into law by the legislative representatives of the State of New York, an alternative districting plan drawn by a private citizen

which does not respect the integrity of existing election district lines, merely because the latter plan may contain smaller population disparities?

3. (a) Does the claim of "partisan gerrymandering" as posed by appellant raise a justiciable issue under the Federal Constitution?

(b) Assuming, *arguendo*, that a claim of partisan gerrymandering raises a Federal constitutional issue, has appellant met his burden of proving that the New York Legislature acted unconstitutionally in establishing the present congressional districts?

Summary of Argument

The congressional districting plan set forth in Chapter 8 of the Laws of 1968 has been found by the District Court to have eliminated the population disparities among districts that had formed the basis of its prior decision invalidating the 1961 Act. Whereas the former congressional districts varied by as much as 29.5% between adjacent districts in Kings County (Brooklyn), the 1968 Act has created seven new districts in this area with population disparities of less than 1/10 of one per cent.

Since the peculiar geographical contour of the State of New York naturally divides into regions, the District Court found that it was rational for the Legislature to have considered regional distinctions in creating congressional districts so long as equality of population within each region and throughout the State remained the prime consideration, and so long as no discrimination against any region had been shown. In addition to affording recognition to regionalism, the Court below found that the Legislature had sought to maintain the integrity of county and election district lines wherever possible in the creation of congressional districts.

The fact that appellant, a private citizen unconcerned with securing legislative approval, may have been able to produce a plan which on paper contains a somewhat smaller maximum population deviation among congressional districts than the Legislature's plan (4.7% as compared to 6.6%), is not a basis for requiring the invalidation of the 1968 Act. Appellant's plan made little effort to afford recognition to regional differences in constituencies or to avoid the splitting of election district lines in metropolitan areas (a requirement followed by the Legislature to avoid extensive confusion among voters in the 1968 elections). If a single citizen's plan can invalidate a districting statute by a mere showing of apparent arithmetic superiority, the deliberative role of the Legislature would be reduced to merely rubber stamping the computations of a slide rule.

With respect to appellant's claim of so-called "partisan gerrymandering", appellant has failed to present a Federal constitutional issue. The lack of manageable standards to resolve partisan disputes over the drawing of district lines, where countless alternative districting approaches might be available, has wisely led other Federal and State courts to refuse to become "political pawns" in determining such non-justiciable issues.

It would be difficult to conceive of a weaker test case than the instant appeal to pass upon the issue of partisan gerrymandering. Here, the congressional districting plan under review was enacted with extensive bi-partisan support, passing the Democratic-controlled Assembly and the Republican-controlled Senate. No representative of any political party has come forth to attack the new district lines, nor has it been shown how the members of any political party in New York have been the victim of deliberate discrimination.

Appellant has failed to present any evidence to document his charges other than to infer "gerrymandering" from

the non-rectangular shape of a few districts. Such inference not only ignores the political realities of a divided Legislature, but can readily be explained by the fact that the districts in question were based on county and assembly district lines.

The New York Legislature will draw new congressional district lines after the 1970 census when the State is expected to lose at least one congressional seat. But in the meantime, the 1968 Act, in the District Court's words, "will give the voters an opportunity to vote in the 1968 and 1970 elections on a basis of population equality within reasonably comparable districts" (A. 50).

ARGUMENT

POINT I

The decision of the District Court sustaining the constitutionality of New York's 1968 congressional redistricting act is in conformity with the reapportionment decisions of this Court.

In *Roman* v. *Sincock*, 377 U. S. 695, this Court advised (p. 710):

> "• • • the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."

Other reapportionment decisions of this Court have indicated that rational State policies that might be considered in the drawing of district lines include the integrity

of poltical subdivisions and the recognition of natural or historical boundary lines. *Reynolds* v. *Sims*, 377 U. S. 533, 579-581; *Swann* v. *Adams*, 385 U. S. 440, 444.*

Consistent with the teachings of this Court, the District Court examined the congressional districting plan established by Chapter 8 of the New York Laws of 1968 and found that it passed constitutional muster.

Of prime significance, the District Court, in its opinion below, found that the population disparities, which were the basis of the original complaint and of its prior opinion invalidating New York's 1961 Congressional Districting Act (273 F. Supp. 984) have been remedied by the enactment of the 1968 statute (A. 49).

The former congressional districts established by the 1961 Act ranged from 15.1% above average in the largest district to 14.4% below average in the smallest district. Six of the former congressional districts had a population that was more than 10% above average and seven districts had a population that was 10% below the average population per district in the State. Under the 1968 Congressional Redistricting Act, there is no congressional district in the State containing a population in excess of 10% of the average population per district. The largest disparity among the present congressional districts, 6.4% below the State average, can be explained by rational considerations as will be noted below.

In Kings County (Brooklyn) where the greatest population disparities were found in the 1961 Act, including a population spread of 29.5% between two contiguous dis-

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* Although the above decisions dealt with State legislative apportionment plans, this Court has indicated that the same principles of law apply to the determination of the constitutionality of congressional districting plans. See *Kirkpatrick* v. *Preisler*, 385 U. S. 450; *Duddleston* v. *Grills*, 385 U. S. 455.

tricts, the 1968 Act established seven new districts with the following populations:

C. D.		
10	417,122	part of Kings, part of Queens
11	417,090	part of Kings
12	417,298	part of Kings
13	417,040	part of Kings
14	417,080	part of Kings
15	417,090	part of Kings
16	417,478	part of Kings, Richmond

There can be no dispute with the District Court's conclusion that "[a]lmost absolute equality has been attained for these seven districts * * *" (A. 48).

The minor population disparities under the 1968 statute were found by the District Court to rest upon rational considerations given by the Legislature to achieving equality of population throughout the State and within the natural geographic and economic regions within the State, the geographical conformation of the area to be districted, the maintenance of county integrity wherever possible, and the desire to avoid needless splitting of existing election districts in metropolitan areas which would require Boards of Election to change their enrollment books and to notify all registered voters of such changes. See Interim Report of the Joint Legislative Committee on Reapportionment, A. 53-73; statement of counsel for the Legislature before the three-judge Court, Steno. Minutes, Hearing of Mar. 12, 1968, pp. 22-71; A. 110-140.

Recognizing that the peculiar geographical contour of the State naturally divides into regions, the District Court found that it was rational for the Legislature to take these regions into account in establishing congressional districts so long as equality of population within the region and throughout the State remained the prime consideration, and so long as no discrimination had been shown.

For example, the Court found that it was logical in view of its population, interest, finances, charter, custom, and history, to separate the City of New York from the rest of the State in establishing congressional districts. Since the 19 districts accorded New York City average 409,109 per hypothetical district as against a State average of 409,326, no charge of discrimination can be made, nor was made by any of the parties, with respect to such separation. Appellant "does not quarrel with this treatment of New York City as a unit * * *". Brief for Appellant, p. 21.

The City of New York, itself, divides into geographical segments with Manhattan (New York County) and The Bronx being separated by water from the rest of the City. Since the population of The Bronx (1,424,815) was insufficient to support four full congressional districts, the Legislature joined the southwest extension of the 23rd district in The Bronx to an area in Manhattan to which it is linked by four bridges. Interim Report, *supra*, A. 64-66. The eight districts accorded to The Bronx and Manhattan range in population from 390,023 to 390,861.

The population of Queens (1,809,578) presented a problem since its division into four or five full districts would have produced excessive disparities from the State mean. Since the Rockaways (a peninsula that is part of Queens though linked by a toll bridge to Brooklyn), with a population of 70,891, had previously been linked with the congressional districts in Brooklyn, the Legislature maintained that division. As a result, four districts lying wholly within Queens were created, with a population range of 434,770 to 434,552. Since Richmond (Staten Island), with a population of 221,991 is not large enough to support a full district, it was joined with Kings and the Rockaway peninsula to create seven districts ranging from 417,040 to 417,478.

Since the area east of New York City contains only the Counties of Nassau and Suffolk, equality of population per

district within this area required the establishment of five districts with populations ranging from 393,585 to 393,183.

In establishing congressional districts north of the New York City line, the Legislature adhered to county lines wherever possible.* Westchester, a large county, was merged with adjacent Putman, a small county to produce two districts of 420,146 and 420,467 persons. None of the other counties north of New York City have been divided in the creation of congressional districts except for Monroe and Erie Counties, whose populations of 586,387 and 1,064,688 respectively, were too large to prevent their division. Monroe County was divided along the Genesee River—as it had been in the prior two redistricting laws (L. 1961, ch. 980, L. 1951, ch. 839)—to create the 36th and 37th Congressional Districts with populations of 410,943 and 410,432 respectively.

While no district can be regarded as the private preserve for any incumbent if it offends the equality of population principle, the Legislature also recognized that effective representative government dictates against needless changes in congressional constituencies.** Since, after the results of the 1970 census have been announced new congressional districts will, in all likelihood, have to be drawn in the State of New York in time for the 1972 elections (see p. 33, *infra*), the Legislature had extra cause to maintain the congressional districts in the area of the State with small disparities in population. As a result, the congressional districts in the western half of the State, where no district under the 1961 statute exceeded the State mean by more than 6.6%, were left intact in the new statute.

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* New York has traditionally prohibited the division of counties with less than a full ratio in the formation of state senate districts. N. Y. Const., Art. III, § 4.

** In *Reynolds* v. *Sims*, 377 U. S. 533, 583, this Court recognized that "* * * Limitations on the frequency of reapportionment are justified by the need for stability and contiguity in the organization of the legislative system, * * *".

Despite the fact that these western districts were not criticized in the prior opinion of the District Court overturning the 1961 statute, appellant now argues that districts with smaller disparities should have been created in this area. Although smaller disparities from the State mean could have been established in that area by creating new districts, the existing districts rest upon rational State policies. For example, the 38th C.D. which contains the largest deviation from the State mean (—6.6%) consists of the small agrarian counties of Chautauqua, Cattaraugus, Allegany, Steuben and Schuyler in the southwest portion of the state. Appellant suggests merging that district with a portion of Erie County. However, whereas the people of Erie and Niagara Counties form part of the same standard metropolitan statistical area (the so-called Niagara Frontier) and are treated as a unit in various Federal and State projects, the population of the five aforementioned southwest counties have no common interest or link with the people in Erie County. See Interim Report, *supra*, pp. 15-16 (A. 67); Steno. Minutes, Hearing of March 12, 1968, pp. 51-54 (A. 127-129).

Since the District Court recognized that the population along the Niagara Frontier "could not very well be shunted into the more easterly counties", the provision for three congressional districts in this area with populations ranging from 435,393 to 435,880 were found by the Court to be satisfactory (A. 48).

The District Court concluded that:

> "The gross population disparities, which were the source of plaintiffs' original complaint and which brought about a declaration of unconstitutionality, have been remedied so that equality is to be found in regions logically selected for the various congressional districts." 281 F. Supp. at 825 (A. 49).

POINT II

The 1968 congressional districts in New York compare favorably with other judicially sanctioned congressional districting plans.

It should be acknowledged that the new congressional district lines in New York, with a maximum population deviation of 6.6% from the State mean, compare favorably with congressional districting plans that have been judicially approved in other states.

In Illinois, a Federal three-judge Court working in conjunction with the Supreme Court of Illinois adopted its own plan for 24 congressional districts which range in population from 7.5% above average to 6.1% below average. *Kirby* v. *Illinois State Electoral Board,* 251 F. Supp. 908 (N. D. Ill., 1965); *People ex rel. Scott* v. *Kerner,* 33 Ill. 2d 460, 211 N. E. 2d 736.

In Arizona, a Federal Statutory Court also drew its own plan for three congressional districts which ranged in population from 5.18% above average to 6.64% below average. *Klahr* v. *Goddard,* 250 F. Supp. 537 (D. Ariz., 1966).

In Alabama, a Federal Statutory Court sustained a 1965 congressional districting act for eight congressional districts which ranged in population from 7.3% above average to 6.0% below average. *Moore* v. *Moore,* 246 F. Supp. 578 (S. D. Ala., 1965).

In California, the State's highest court approved a congressional districting statute for 38 congressional districts ranging in population from 8.1% above average to 6.0% below average. *Silver* v. *Reagen,* 64 Cal. Rptr. 328, 434 P. 2d 621 (1967).

In *Kirk* v. *Gong,* 389 U. S. 574, this Court affirmed the judgment of a Florida District Court which had adopted a congressional districting plan whose largest district—based on 1960 census figures—is 8.78% above the State mean.

Other states in which congressional districting plans have been judicially approved with larger population disparities than found in New York's present Act, based on 1960 census figures, are Kansas: *Meeks* v. *Avery*, 251 F. Supp. 245 (D. Kans., 1966); Nebraska: *Exon* v. *Tiemann*, 279 F. Supp. 609 (D. Neb., 1968); and New Hampshire: *Levitt* v. *Maynard*, 107 N. H. 38, 216 A. 2d 778 (1966).

Appellant, on the other hand, points to the decision of the District Court in *Preisler* v. *Secretary of State of Missouri*, 279 F. Supp. 952 (W. D. Mo., 1967),* where a plan with a maximum population spread of 25,802 was held invalid. However, the *Preisler* decision was based on considerations which are entirely inapposite to the situation in New York. The Missouri Federal Court, in invalidating the 1967 Congressional Districting Act, held that the districts created by that Act in rural areas were over-valuated in contrast to districts in metropolitan areas and that the Act particularly discriminated against the metropolitan area of St. Louis and Kansas City. *Id.* at 975. By contrast, no claim has been made, nor can be made, that the new congressional districts in New York discriminate against any metropolitan area. Moreover, the majority of the District Court in Missouri believed that the Legislature had decided that it could create minor deviations among districts under a so-called "de minimus" rule without having to present any rational considerations for such deviations.

The New York Legislature did not choose a 6.6% maximum deviation as a "safe tolerance" figure within which districts could be created. It recognized, as this Court has pointed out;

> "* * * the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. 'What

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* This decision is now being appealed in *Kirkpatrick* v. *Preisler* (No. 30) and *Heinkel* v. *Preisler* (No. 31).

is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case. *Reynolds* v. *Sims*, 377 U. S. 533, 578.' " *Swann* v. *Adams*, 385 U. S. 440, 445.

Rather, as described above, the present congressional districts in New York were the result of legislative determination to create congressional districts that were equal in population with minor disparities only where necessary to afford recognition to natural geographic regions and to the integrity of county and election district lines.

POINT III

The submission of a districting plan drawn by a private citizen did not require the District Court to invalidate the congressional redistricting statute enacted by the New York Legislature merely because the former plan assertedly contained smaller population disparities.

Appellant, representing no legislative constituency, and subject only to his own private desires, has attempted to carve out a congressional districting plan for the State of New York. Since his plan, on paper, contains a somewhat smaller maximum deviation among its congressional districts than the plan enacted by the Legislature (4.7% as compared to 6.6%), appellant concludes that the State has failed to make an honest and good faith effort to construct districts "as nearly of equal population as is practicable."

It is extremely questionable whether appellant's plan can be properly referred to as a districting plan. Anyone who has ever witnessed the work of technicians employed by the New York Legislature in transferring census enumeration tract figures to enlarged maps of counties, towns, and assembly districts (A. 132) that often exceed thirty feet in length, may have cause to doubt whether a private citizen, without access to such legislative maps, can draw districts

with adequate descriptions.* It is, therefore, not surprising that the consultant for the New York State Senate testified at the hearing below that he was unable to draw a map of appellant's plan in Nassau County because of its inadequate descriptions (A. 124).

The inexactitude of plaintiff's plan is illustrated by the fact that the population figures offered by him for twenty-six of his proposed congressional districts are admittedly only approximate estimates. See Appendix D of Brief for Appellant.

It is also apparent that appellant's plan made little attempt to respect the integrity of existing election district lines in the drawing of congressional districts in metropolitan areas. Yet, the adoption of a districting plan, which failed to recognize the integrity of these lines, could have led to chaos in the conduct of the primary and general elections in 1968.

Since a system of permanent personal registration applies throughout most of the State of New York, Election

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* During the 1965 session of the New York Legislature, an attempt was made to draw new Assembly and Senate district lines after the State's highest Court had ruled that the district lines drawn by the previous session were in violation of the State Constitution. *Matter of Orans*, 15 N. Y. 2d 339. In a letter to the three-judge statutory court sitting in *WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. 1965), the counsel to the Speaker of the Assembly stated on April 20, 1965 that his reapportionment staff had already spent 1570¾ man-hours in their effort to draw new legislative district lines, but had not yet completed their task. Three weeks later (and at least another one thousand man-hours of work), the Speaker of the Assembly presented a districting plan for the State Assembly to the three-judge statutory court. Although offered as a completed plan, this Assembly plan was later found to have inadvertently omitted 5 towns and several cities in the State of New York in its description of Assembly districts. Even the technicians employed by the Judicial Commission appointed by the New York Court of Appeals to draw Assembly and Senate district lines in 1966 (*Matter of Orans*, 17 N. Y. 2d 107) inadvertently omitted the Town of DeWitt from its description of legislative districts. 17 N. Y. 2d 721.

Law [1967] § 350 (2), the great majority of New York residents do not have to register prior to voting on Election Day. Registration records are tabulated according to election districts (generally containing no more than 1500 persons) and since each voting machine in an election district must contain the same set of candidates, the "splitting" of an established election district line by a new congressional district would require the Board of Elections to (1) attach the detached part of the district to an existing district or to create a new election district, (2) notify individually all persons living in that part of the district which is changed and (3) change all election enrollment records and "buff cards" to conform to the altered election districts. For all of the above reasons, the New York Legislature made an earnest attempt to maintain election district lines where at all possible, to reduce the work of the individual Boards of Election to a minimum. Only 16 election districts were altered by the Legislature throughout the entire State. Interim Report of the Joint Legislative Committee on Reapportionment, *supra*, p. 9 (A. 60-62).

On the other hand, the maps for the 6th and 7th Congressional Districts drawn by appellant reveal a division of 20 existing election districts in that part of Queens County alone (A. 132). Based on that projection, it was testified below that well over 100 election districts would have been divided within the City of New York alone by appellant's plan.

Even apart from the above irregularities in appellant's plan, it was not incumbent upon the Court below to have rejected a plan enacted by the legislative representatives of the citizens of New York merely because a private citizen—unconcerned with the need to secure sufficient support among the diverse interests represented in the State Legislature—produced a plan which on paper appears to be numerically superior. To accept plaintiff's plan on this basis alone would fly in the face of the legis-

lative process. As a Federal court recognized in *Moore* v. *Moore*, 246 F. Supp. 578, 582 (S. D. Ala., 1965):

> "Although constitutional rights and principles cannot be ignored or made subordinate to political expediency, courts recognize the fact that legislative bodies in a democracy do not, and cannot perform and function according to a slide rule, or with mathematical precision and certainty. Democracy does not operate in that fashion. There remains the necessity of giving consideration to all legitimate contentions, interests and other appropriate factors involved in the legislative process."

In similarly rejecting an attempt by litigants to have a Federal statutory court select a private plan that was offered as being superior to the Congressional Districting Act of the Legislature, the Court in *Bush* v. *Martin*, 251 F. Supp. 484, 510 (S. D. Tex., 1966), stated:

> "Thus the fact that districting within a 1% tolerance is attainable by a process other than legislative cannot be the final test as to what is reasonable and practicable for legislative action. Courts, faithful to concept of separation of powers, must recognize therefore the operative effect of so-called 'political' factors so long as they do not represent invidious attacks on, or denials of, identifiable basic freedoms such as race or religion. So long as the result passes muster on substantial numerical equality, these might include here such things as the desire to minimize as much as possible the pairing of incumbent congressmen in the transition from the old (unconstitutional) to the new districting, the retention of counties as whole units, the retention so far as possible of former groupings of counties, and the like."

The specific proposals in appellant's plan cited to support his contention that the Legislature could have produced smaller population disparities (Brief for Appellant,

pp. 22-23) merely reflect his refusal to recognize the geographic and historic factors which were considered by the Legislature.

Appellant would withdraw the northern districts by shifting Lewis County from the 31st to the 32nd Congressional District and Hamilton County from the 30th to the 31st Congressional District. However, Lewis County, which is located within the Adirondack Preserve (the forest preserve which must be kept "forever wild" by command of the State Constitution, Art. XIV, § 1), traditionally has been linked with the northern counties that fall within this geographically isolated area (the so-called "Blue-line counties"). (S. M., Hearing of March 12, 1968, pp. 54-57, A. 129-131.) To have linked this county southward with Oneida County, as appellant suggests, would have produced the illogical result of merging an Adirondack county with the Mohawk Valley's urban centers.*

Appellant's suggestion with respect to Hamilton County, which would remove it from the same district with Fulton County, ignores the fact that because of its small population, Hamilton County has historically been united in government and interest with Fulton County and has even been required under the New York Constitution to share the same Assembly seat. N. Y. Constitution, Art. III, § 5.

Ultimately, appellant's position leads to the conclusion that any citizen may set aside a redistricting statute enacted by the elected representatives of the public by pointing to a paper plan containing smaller population disparities. Were such a conclusion to be accepted by this Court, the State legislatures might just as well be replaced by computers in the establishment of district lines.

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* Appellant's contention that the "Blue-line counties" are grouped somewhat differently in the State Legislature overlooks the fact that such legislative districts are much smaller in population than the average population of congressional districts.

The basic fallacy in appellant's approach is that it discards the traditional role of the courts in examining the constitutionality of State statutes. That role is not to determine whether the statute before it is the wisest that might have been conceived. *Cf. Ferguson* v. *Skrupa*, 372 U. S. 726. Nor is it the function of a Federal court to sit as a reapportionment commission to pass upon competing redistricting plans. Rather, when a redistricting statute is before it, the court's duty is to determine whether such statute conforms to the requirements of the Constitution of the United States. *Sincock* v. *Roman*, 233 F. Supp. 615, 619 (D. Del., 1964), *aff'd* 377 U. S. 695.

The Court below has examined New York's 1968 congressional redistricting statute in that light and found, as we have seen, that it properly meets these requirements by creating districts that are substantially equal in population while affording recognition to rational State policies.

POINT IV

Appellant's claim of partisan gerrymandering presents a non-justiciable issue and, in any event, is totally without merit.

In attempting to challenge the constitutionality of New York's 1968 Congressional Districting Act upon the ground of "partisan gerrymandering", appellant has raised a "non-justiciable issue" which Federal courts consistently have refused to consider. See *e.g., WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916, 925-926 (S.D.N.Y., 1965), *aff'd* 382 U. S. 4; *Bush* v. *Martin*, 251 F. Supp. 484, 513 (S. D. Tex., 1966); *Sincock* v. *Gately*, 262 F. Supp. 739, 831-833 (D. Del., 1967); *Meeks* v. *Avery*, 251 F. Supp. 245 (D. Kans., 1966); see also *Jones* v. *Falcey*, 48 N. J. 25, 222 A. 2d 101, 105 (1966).

In *WMCA, Inc.* v. *Lomenzo, supra*, this Court affirmed the judgment of the District Court which, in sustaining

the constitutionality of a legislative plan (Plan A), had held that claims of partisan gerrymandering did not raise a Federal constitutional issue. In his concurring opinion, Mr. Justice HARLAN observed (382 U. S. at 5-6):

> "In *WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916, the three-judge Court found that Plan A satisfied this order; in so doing it rejected contentions that apportioning on a basis of *citizen* population violates the Federal Constitution, and that partisan 'gerrymandering' may be subject to federal constitutional attack under the Fourteenth Amendment. In affirming this decision, this Court necessarily affirms these two eminently correct principles."

In *Badgley* v. *Hare*, 385 U. S. 114, an appeal from the decision of the Supreme Court of Michigan (377 Mich. 396) contending that the apportionment scheme approved by that Court was based on political gerrymandering, was dismissed by this Court "for want of a substantial Federal question". It has been said that "votes to affirm summarily, and to dismiss for want of a substantial Federal question, it hardly needs comment, are votes on the merits of a case * * *". *Ohio ex rel. Eaton* v. *Price*, 360 U. S. 246, 247 (Memorandum of Mr. Justice BRENNAN). See also, *Port Authority Bondholders Protective Committee* v. *Port of New York Authority*, 270 F. Supp. 947, 950-951 (S.D.N.Y., 1967).

Appellant contends that certain opinions of this Court were premised on the assumption that the issue of partisan gerrymandering raises a Federal constitutional issue citing; *Wright* v. *Rockefeller*, 376 U. S. 52; *Fortson* v. *Dorsey*, 379 U. S. 433; *Burns* v. *Richardson*, 384 U. S. 73 and *Gomillion* v. *Lightfoot*, 364 U. S. 339. However, the *dicta* in the *Fortson* and *Burns* opinions dealt only with multi-member apportionment schemes and have no relevance to the single-member districting scheme involved in the instant case, while the *Wright* and *Gomillion* cases dealt with the

issue of *racial* gerrymandering which again has no relevance here. Indeed, on the issue of justiciability, this Court in *Gomillion* held, 364 U. S. at 346, 347:

> "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. *Apart from all else, these considerations lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation.*" (emphasis supplied)

With respect to partisan districting, there is no express mandate such as the Fifteenth Amendment to protect the members of political parties. Moreover, since voters can change their mind,* unlike their race, there is not even a "readily isolated segment" of any political minority to simplify the determination and application of proper districting standards. Thus, unlike *Gamillion*, there is here no basis for lifting alleged partisan gerrymandering controversies out of the political arena and into the arena of constitutional litigation.

The immense difficulties inherent in any judicial effort to resolve claims of partisan gerrymandering have similarly been recognized by the State courts. The problem was well described by the Supreme Court of New Jersey in *Koziol* v. *Burkhardt*, 51 N. J. 412, 241 A. 2d 451, 453 (1968), where,

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* The recent political history of New York State can provide innumerable examples of frequent shifts in political persuasions. Examples of the difficulties in predicting political fortunes in congressional races in New York State were pointed out by Circuit Judge MOORE in his opinion in *Honeywood* v. *Rockefeller*, 214 F. Supp. 897, at 902-03, n. 6 (E.D.N.Y., 1963), *aff'd* 376 U. S. 222.

quoting from its earlier opinion in *Jones* v. *Falcey*, 48 N. J. 25, 222 A. 2d 101, 105, the Court held:

> "The trial court described such issues as non-justiciable. Perhaps it would be more accurate to say such issues are beyond judicial condemnation, not because the controversy is beyond the jurisdictional authority of the Court, but rather because the Constitution does not prescribe a single approach or motivation for the drawing of district lines, and hence the Constitution is not offended merely because a partisan advantage is in view. Indeed, it would be difficult to separate partisan interests from other interests, since partisan interests may well be but a summation of such other interests. In addition, it would seem impossible for a court to pass upon the validity of political interests without itself making a political judgment or appearing to do so. For these reasons the view generally taken in this new area of judicial activity is that, if the mathematics are acceptable, it rests with the voters, rather than the Court, to review the soundness of the partisan decisions which may inhere in the lines the Legislature drew. * * *"

A. The Lack of Judicially Discoverable Standards in Partisan Gerrymandering Disputes

In *Baker* v. *Carr*, 369 U. S. 186, this Court, in speaking of a test for defining a non-justiciable political question, stated (p. 217):

> "Prominent on the surface of any case held to involve a political question is found * * * a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion * * *."

These criteria of non-justiciability clearly apply to questions as to gerrymandering. A claim that a judicially enforceable constitutional right exists necessarily implies that

there are principles or rules derivable from the Constitution by which the validity of the claim can be judged, and which can be used in devising an effective remedy. There are, however, no judicially discoverable standards to be derived from the generalized guarantee of the Equal Protection Clause by which the courts may determine the proper shape of legislative districts. If such standards are to be devised, they will necessarily involve initial policy determinations of a legislative rather than a judicial nature.

Appellant, apparently searching for some manageable standards to resolve "gerrymandering disputes" would like this Court to write into the Fourteenth Amendment a set of specific standards to govern congressional districting, including requirements that districts be "compact and contiguous". But such an approach would require this Court to overrule its prior decision in *Wood* v. *Broom*, 287 U. S. 1, which held that there was no Federal constitutional requirement for compactness and contiguity in the creation of congressional districts.

However, even the adoption of constitutional requirements for compactness and contiguity would not necessarily prevent partisan gerrymandering. One might visualize a square-shaped state entitled to four congressional seats where the members of Party A, with 60% of the voting strength in the state, are located along the periphery of the state's borders, while the members of Party B, with 40% of the state's population, are concentrated in the center of the State. Dividing the state into four equal squares would produce aesthetically pleasing districts, but would still constitute a partisan effort to prevent Party B from capturing any one of the four allotted congressional districts. A recognized expert in the area of reapportionment, in speaking of the "myth of compactness" has stated:

> "• • • A rigid compactness-contiguity rule shifts attention from the realities of party voting to mere physical geography. • • •

> The reality is that odd-shaped districts sometimes *may* facilitate unfair advantage of one party over another. The reality also is that odd-shaped districts *may be* one way, short of some proportional representation device, of avoiding 'wasted votes,' i.e., of ensuring some minority representation by recognizing a few relatively safe enclaves for the weaker party. In the latter instance questions of representation theory can be raised as to whether it is preferable for a minority to have its own voice in the legislature, or to be voiceless except through the dominant party. But in any event a rigid compactness rule will not provide satisfactory answers.'' Robert G. Dixon, Jr., *Democratic Representation, Reapportionment in Law and Politics,* 460-461 (New York, Oxford University Press, 1968)

It should also be acknowledged that a constitutional requirement of ''compactness'' would require courts to take into consideration the fact that population patterns are generally not spread across a state in a checker-board fashion, that state and political subdivision lines are frequently irregular, and that topographical features such as hills, forests and bodies of water do not lend themselves to symmetrical geometric designs.

Even in a metropolitan area such as New York City, the presence of parks, cemeteries, transportation arteries, industrial parks, and the desire to avoid splitting election district lines can unavoidably produce odd-shaped districts. See, *e.g., Matter of Dowling,* 219 N. Y. 44, 58 (1916); see also the shapes of the legislative districts drafted by a judicial commission appointed by and approved by the New York Court of Appeals in *Matter of Orans,* 17A. N. Y. 2d (1967).

When one studies the immense shape of New York City, it is easy to appreciate the exasperation that must have

been felt by Judge Moore when, speaking for a unanimous court in *Honeywood* v. *Rockefeller*, 214 F. Supp. 897 (E.D.N.Y., 1963), *aff'd* 376 U. S. 222, he stated (p. 900):

> "It is impossible for us to speculate, and indeed it is not our function to do so, on why a district line turns to the right at one street and left at another. There are a myriad of possible variations in the drawing of such lines. * * *"

It should, therefore, be evident that any attempt by the courts to review the shape of legislative districts with a view towards determining claims of partisan gerrymandering would require them to enter a hopeless morass, in which they would be required to weigh map changes, shifting population densities, topographical barriers, competing considerations relevant to various political subdivisions, evidence of legislative motivation, and the interrelationship of all of these factors with respect to adjacent and neighboring districts. Whereas apportionment cases lend themselves to a determination by a ready application of available arithmetic statistics, districting cases would require value judgments among many competing variables, the strength of which would vary from case to case.

In the absence of legislative standards of districting, it cannot profit the administration of justice to require the Federal courts, and particularly this Court, to form an essentially visceral reaction to the shape of each of the thousands of districts that might be subject to challenge throughout the 50 states.

B. Appellant's Lack of Evidence to Substantiate His Charge of Partisan Gerrymandering

Even assuming *arguendo*, that a claim of partisan gerrymandering presented a justiciable issue under the Federal Constitution, appellant failed to present such evidence before the District Court as would be required to sustain

his burden of proof on this issue. *Cf. Wright* v. *Rockefeller*, 211 F. Supp. 460 (S.D.N.Y., 1963), *aff'd* 376 U. S. 52, *rehearing denied* 376 U. S. 959; *Honeywood* v. *Rockefeller, supra.*

At the Court hearing below, appellant's argument with respect to this issue merely consisted of the charge that the non-rectangular shape of certain congressional districts, in and of itself, demonstrated that the New York Legislature was guilty of partisan gerrymandering in the enactment of Chapter 8 of the Laws of 1968. In attempting to support this claim, appellant pointed to the shape of the 35th and 6th Congressional Districts.

There can be little question that the 35th and 6th Congressional Districts are not rectangular in shape. However, this hardly supports a charge of constitutionally impermissible partisan gerrymandering. The shape of the 35th Congressional District is determined by the fact that it is made up of eight agrarian counties (all of which are undivided) located in the lower central valley of New York State. A more symmetrical district might have been created by dividing county lines, or by merging several of these agrarian counties with the metropolitan areas of Utica or Syracuse, but such a division or realignment was considered illogical by the Legislature.

It is interesting to note that appellant criticized this district (which has remained the same since it was created in 1961) when he testified as a witness on behalf of the plaintiff in *Honeywood* v. *Rockefeller, supra,* in 1962 contending that the 35th District was drawn to ensure the election of a Republican congressman. Yet, the Democratic Party has elected its candidate in each of the four congressional elections that have taken place since this district was created.

The lines of the present 6th Congressional District, which appellant attacks, are derived from the formation of this

district from the 20th and 22nd Assembly Districts which were created by the Judicial Commission appointed by the New York Court of Appeals (A. 121-122).* The maps of these assembly districts, which were approved by the New York Court of Appeals in *Matter of Orans*, 17 N. Y. 2d 107, may be found in Folder No. 8 contained in 17A. N. Y. 2d.

Appellant's brief before this Court now follows the approach that if he can show that the lines of any one particular district, such as the 6th Congressional District in Queens County, favor a political party, this is enough to invalidate an entire congressional districting scheme. The obvious flaw with such an approach is that *any* districting plan could be invalidated on that basis. Under such a definition, all districting plans could be classified as "gerrymandering" depending upon the "accident of sleeping place". Robert Luce, *Legislative Principles*, 393 (Boston: Houghton-Miffin Co., 1930); Dixon, op. cit., p. 462.

The impossibility of avoiding partisan results was aptly illustrated by A. Robert Kleiner, Democratic member of the Michigan Apportionment Commission at a National Municipal League Speech in 1966 (quoted in Dixon, op. cit., p. 436):

> "Every plan has a political effect, even one drawn by a seventh grade civics class whose parents are all nonpartisans and who have only the United States census data to work with. Even though they drew such a plan with the most equal population in districts, following the maximum number of political subdivision bounadries and with the most regular shapes, it could very well result in a landslide election for a given political party."

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* Congressional districts are frequently formed to coincide with assembly district lines in New York City where political organizations are based on assembly districts or fractions thereof.

Even a more traditional definition of a "gerrymander" would not help appellant's case. For example, a "gerrymander" has been defined as:

> "• • • the abuse of power whereby the political party dominant at the time in a Legislature arranges constituencies unequally so that its voting strength may count for as much as possible at elections and that of the other party or parties for as little as possible. To accomplish this design it masses the voters of the opposing parties in a small number of districts and so distributes its own voters that they can carry a large number of districts by small majorities", 6 *Encyclopaedia of the Social Sciences* 638 (1931).

Neither appellant, nor any other objectant below, demonstrated that there was any abuse of power in the enactment of Chapter 8 by the Legislature. In terms of political realties, since the New York Legislature was politically divided in 1968 (with the Democratic Party controlling the Assembly and the Republican Party controlling the Senate), it would have been impossible for any redistricting bill to have passed both houses if it had been drawn to favor a political party. Instead, Chapter 8 received overwhelming bi-partisan support in passing the Assembly by a vote of 126 to 19 and the Senate by a vote of 51 to 5. *N. Y. Times,* Feb. 27, 1968, p. 1.

The weakness in appellant's claim is underscored by the obvious fact that no representative of any of the political parties in New York State have challenged the new congressional districting lines. Even Donald S. Harrington, Chairman of the State Committee of the Liberal Party of the State of New York, who was one of the original plaintiffs in this action in his representative capacity, has withdrawn from this appeal.

In the absence of any proof to support his claim of partisan gerrymandering, appellant argues that a state-

ment offered to the District Court by Donald Zimmerman, a spokesman for the Majority Leader of the Senate, constitutes a concession that the 6th Congressional District in Queens was drawn to provide a minority party with some representation. Based on Mr. Zimmerman's statement with respect to this one congressional district (A. 121-123), appellant makes the repeated statement throughout his brief that all the congressional districts in New York State were drawn to achieve proportional representation along partisan lines—despite the fact that there is not a word about proportional representation in the entire Interim Report of the Joint Legislative Committee on Reapportionment, *supra*. If proportional representation had been the goal of the New York Legislature, it is doubtful whether it would have created seven congressional districts in Kings and Richmond Counties in which the Republican Party, with more than 28% of the voting strength in these counties, was unable to win in any of its seven congressional districts in 1968.

In any event, if Mr. Zimmerman's statement is read in the full context of his remarks before the District Court, it will be seen that he was speaking hypothetically with reference to appellant's contention that the districts in Queens County had been gerrymandered since the Republican Party was expected to win in one of its four districts. In answer to this contention, Mr. Zimmerman had argued that he could see nothing improper if a party which received 43% of the total vote in a county is expected to capture one of its four congressional districts.

There is nothing in Mr. Zimmerman's statement that is inconsistent with any decision of this Court. Indeed, it would appear to be supported by this Court's observation in *Fortson* v. *Dorsey*, 379 U. S. 433, 439, that a multimember constituency apportionment scheme which operates to minimize or cancel out the voting strength of racial or

political elements of the voting population might be unconstitutional.*

In sum, appellant's contentions with respect to "partisan gerrymandering" amount to nothing more than undocumented charges resting upon pure conjecture. Apparently, appellant would have preferred the adoption of his own districting plan. But, as the Court below correctly observed (281 F. Supp. at 825, A. 49-50):

> "The Legislature cannot be expected to satisfy, by its redistricting action, the personal political ambitions or the district preferences of all of our citizens. For everyone on the wrong side of the line, there may well be his counterpart on the right side.
>
> • • •
>
> • • • Were each political party, and factions within each party, permitted to by-pass the Legislature by asking the courts to foist upon the electorate districts of their own draftsmanship and choosing, representative government would no longer exist. Self-interest would be substituted for majority rule. The courts cannot become pawns in such a political chess game."

POINT V

Equitable considerations should defer further congressional redistricting in New York until after the 1970 census.

The Court below found that the congressional districting plan contained in Chapter 8 of the Laws of 1968 was in compliance with the reapportionment directives of this

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* It has even been suggested that political profile data be furnished to computers to produce party balance deemed reasonable by the programmers in the light of over-all partisan trends in the State. Stewart S. Nagel, "Simplified Bi-Partisan Computer Redistricting", 17 Stan. L. Rev. 863 (1965); Dixon, op. cit., p. 531.

Court and that such plan "will give the voters an opportunity to vote in the 1968 and 1970 elections on a basis of population equality within reasonably comparable districts" 281 F. Supp. at 826 (A. 50).

It must be conceded, however, that there are "few issues in reapportionment cases that are clear beyond debate." Mr. Justice HARLAN, dissenting, in *Rockefeller* v. *Wells*, 389 U. S. 421, 422 (A. 41). If this Court should now find that any of the congressional districts in the 1968 Act fail to meet constitutional requirements, the question of an appropriate remedy would arise. *Cf. Reynolds* v. *Sims*, 377 U. S. 533, 586-587; *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, 655.

In considering any further change in congressional districts, it should be recognized that the State of New York has created new congressional district lines in 1961 and 1968. Moreover, regardless of the outcome of this appeal, New York will have to draw new congressional lines after the 1970 census when the State is expected to lose one congressional seat.*

Thus, any further redrawing of congressional districts prior to the 1970 census would not only be based on population figures that were nine years old, but would result in *four* changes in congressional constituencies within a ten-year period. Such a result could scarcely be productive of effective representative government. *Cf. Reynolds* v. *Sims, supra*, at p. 583.

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* In a letter from A. Ross Eckler, Director of the Bureau of the Census, to the Attorney General of New York, dated October 29, 1968, the Bureau of the Census advised that under each of the four alternative series of projections of the population of the States in 1970 set forth in its report, Series P-25, No. 375, "Revised Projections of the Population of States: 1970-1985", the State of New York would lose one congressional seat.

CONCLUSION

For the reasons stated above, the judgment of the Court below should be affirmed.

Dated: New York, New York, December 3, 1968.

Respectfully submitted,

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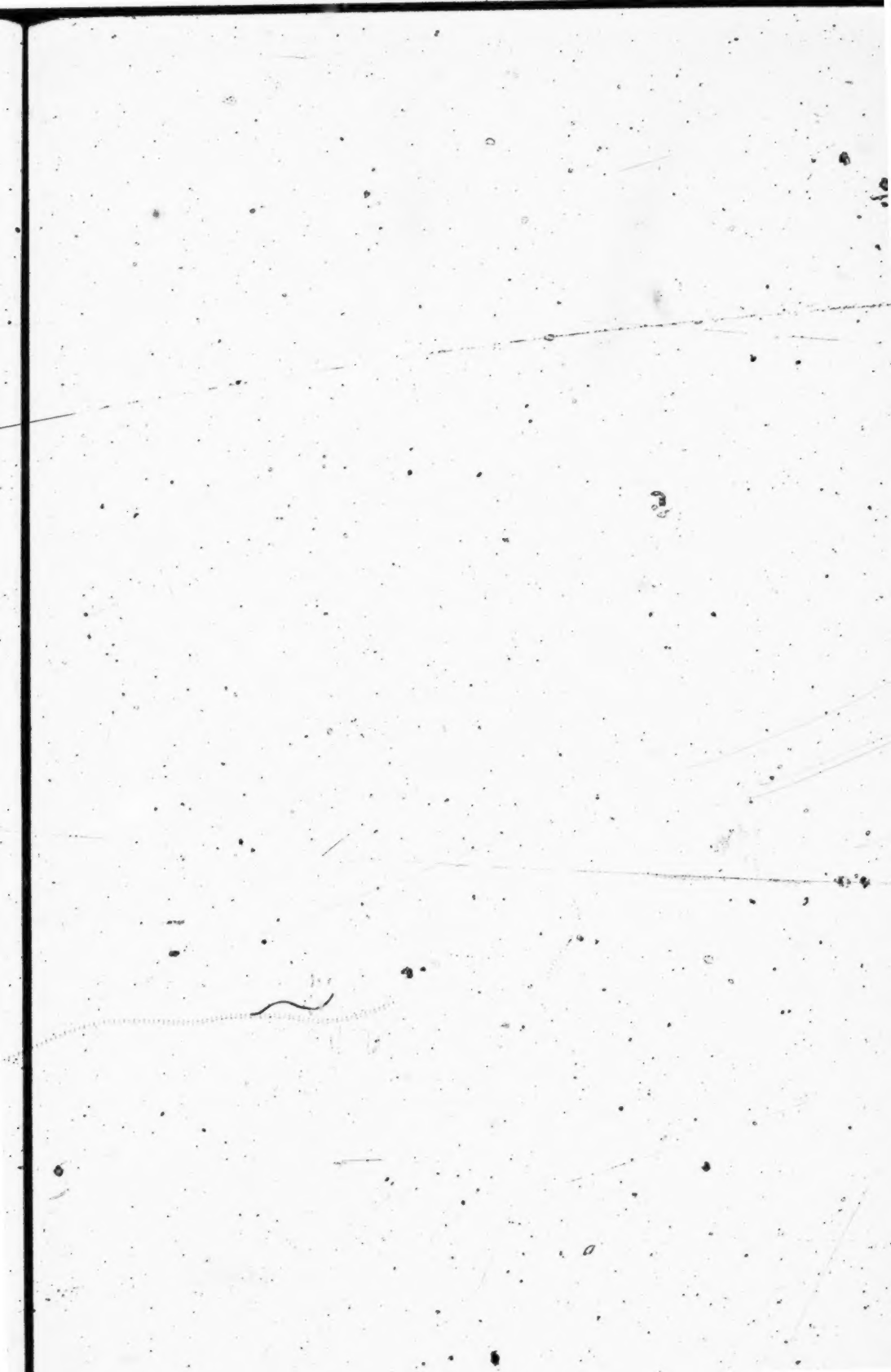

OPINION

SUPREME COURT OF THE UNITED STATES

No. 238.—October Term, 1968.

David I. Wells, Appellant, *v.* Nelson A. Rockefeller, as Governor of the State of New York, et al. | On Appeal From the United States District Court for the Southern District of New York.

[April 7, 1969.]

Mr. Justice Brennan delivered the opinion of the Court.

This case was argued with *Kirkpatrick* v. *Preisler, ante,* which affirmed the judgment of a three-judge District Court declaring invalid Missouri's 1967 congressional districting statute. Before us here is a judgment of a three-judge District Court for the Southern District of New York which sustained the validity of New York's 1968 congressional districting statute, N. Y. L. 1968, c. 8. 281 F. Supp. 821 (1968). In 1967 that court had struck down an earlier districting statute apportioning New York's 41 congressional seats and had retained jurisdiction of the case pending action by the New York Legislature to redress the plan's deficiencies. The court recognized that a thorough revision of district lines might not be possible in time for the upcoming 1968 congressional election but concluded nevertheless that "there are enough changes which can be superimposed on the present districts to cure the most flagrant inequalities." 273 F. Supp. 984, 992, aff'd 389 U. S. 421 (1967).

On February 28, 1968, a month and a half after the New York Legislature reconvened, the districting statute presently under attack was enacted. After a hearing, the three-judge court, on March 20, 1968, sustained the statute, stating that the districting plan afforded New

York voters "an opportunity to vote in the 1968 and 1970 elections on the basis of population equality within reasonably comparable districts." 281 F. Supp., at 826. We noted probable jurisdiction. 393 U. S. 819 (1968). We reverse insofar as the judgment of the District Court sustains the plan for use in the 1970 congressional election.

Appellant levels two constitutional attacks against the statute: (1) that the statute violates the equal-population principle of *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), and (2) that the statute represents a systematic and intentional partisan gerrymander violating Art. I, § 2, of the Constitution and the Fourteenth Amendment. We do not reach, and intimate no view upon the merits of, the attack upon the statute as a constitutionally impermissible gerrymander. We hold that reversal of the District Court's judgment is compelled by our decision today in *Kirkpatrick* v. *Preisler, ante*, which elucidates the command of *Wesberry* that congressional districting meet the standard of equal representation for equal numbers of people as nearly as is practicable.

The District Court correctly held in its 1967 opinion that "there is a burden on the proponent of any districting plan to justify deviations from equality." 273 F. Supp., at 987. The District Court took no testimony on the question of justification at the hearing held to consider the 1968 statute. Recognizing that the statute, which was enacted with virtually no debate on its merits in either house of the New York Legislature, was the work of a Joint Legislative Committee, the court's 1968 opinion refers to the Report of the Joint Committee as the source of the justifications relied upon as sufficient to sustain the population disparities created by the plan. 281 F. Supp., at 823–824. We have been referred to the same source.

The Report recites that the Committee "gave priority to the population totals in the several districts" as they appeared in the 1960 decennial census and that "very limited" consideration was given to population shifts within the State since 1960. The Report recites further that "[o]ther considerations were the geographical conformation of the area to be districted, the maintenance of county integrity, the facility by which the various Boards of Elections can 'tool up' for the forthcoming [1968] primary election, equality of population within the region, and equality of population throughout the state." Interim Report of the Joint Legislative Committee on Reapportionment of N. Y. State Legislature (1968).

The heart of the scheme, however, lay in the decision to treat seven sections of the State as homogeneous regions and to divide each region into congressional districts of virtually identical population. Thirty-one of New York's 41 congressional districts were constructed on that principle. The remaining 10 districts were composed of groupings of whole counties. A chart showing the population of each district under the 1968 statute appears in the Appendix to this opinion. The seven regions are: (a) Suffolk and Nassau Counties on Long Island with five districts having an average population of 393,391 and a maximum deviation from that average of 208; (b) Queens County with four districts having an average population of 434,672 and a maximum deviation from that average of 120; (c) Kings County plus a district made up of part of Kings and part of Queens, and a district made up of Richmond County and part of Kings, with seven districts having an average population of 417,171 and a maximum deviation from that average of 307; (d) New York and Bronx Counties with eight districts having an average population of

390,415 and a maximum deviation from that average of 496; (e) Westchester and Putnam Counties with two districts having an average population of 420,307 and a maximum deviation from that average of 161; (f) Wayne plus part of Monroe and the remainder of Monroe plus four other counties with two districts having an average population of 410,688 and a maximum deviation from that average of 256; and (g) Erie and Niagara Counties with three districts having an average population of 435,652 and a maximum deviation from that average of 228. The 10 remaining "North Country" districts were composed of groupings of whole counties.

It is clear that our decision in *Kirkpatrick* v. *Preisler*, *ante*, compels the conclusion that this scheme is unconstitutional. We there held, at ——, that "the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown." The general command, of course, is to equalize population in all the districts of the State and is not satisfied by equalizing population only within defined sub-states. New York could not and does not claim that the legislature made a good-faith effort to achieve precise mathematical equality among its 41 congressional districts. Rather, New York tries to justify its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact. But we made clear in *Kirkpatrick* that "to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." To accept a scheme such as New York's would permit groups of districts with

defined interest orientations to be over-represented at the expense of districts with different interest orientations. Equality of population among districts in a substate is not a justification for inequality among all the districts in the State.

Nor are the variations in the "North country" districts justified by the fact that these districts are constructed of entire counties. *Kirkpatrick* v. *Preisler*, *ante*.

We appreciate that the decision of the District Court did not rest entirely on an appraisal of the merits of the New York plan. As noted earlier, when the three-judge District Court in 1967 held the then-existing districting plan unconstitutional, it recognized that the imminence of the 1968 election made redistricting an unrealistic possibility and therefore said only that "[t]here are enough changes which can be superimposed on the present districts to cure the most flagrant inequalities." 273 F. Supp., at 992. On February 26, 1968, the New York Legislature enacted the plan before us. On March 20, 1968, the District Court approved the plan for both the 1968 and 1970 congressional elections. Since the 1968 primary election was only three months away on March 20, we cannot say that there was error in permitting the 1968 election to proceed under the plan despite its constitutional infirmities. See *Kilgarlin* v. *Hill*, 386 U. S. 120, 121 (1966); *Martin* v. *Bush*, 376 U. S. 222, 223 (1964); *Kirkpatrick* v. *Preisler*, 390 U. S. 939 (1968). But ample time remains to promulgate a plan meeting constitutional standards before the election machinery must be set in motion for the 1970 election. We therefore reverse the judgment of the District Court insofar as it approved the plan for use in the 1970 election and remand the case for the entry of a new judgment consistent with this opinion.

It is so ordered.

APPENDIX.

Population of New York's Congressional Districts Under 1968 Plan.

C.D.		Dev. %	Description.
1	393,585	− 3.845	Part of Suffolk.
2	393,465	− 3.874	Part of Suffolk, Part of Nassau.
3	393,434	− 3.882	Part of Nassau.
4	393,183	− 3.943	Part of Nassau.
5	393,288	− 3.918	Part of Nassau.
6	434,615	+ 6.178	Part of Queens.
7	434,750	+ 6.212	Part of Queens.
8	434,552	+ 6.163	Part of Queens.
9	434,770	+ 6.217	Part of Queens.
10	417,122	+ 1.905	Part of Queens, Part of Kings.
11	417,090	+ 1.897	Part of Kings.
12	417,298	+ 1.948	Part of Kings.
13	417,040	+ 1.885	Part of Kings.
14	417,080	+ 1.895	Part of Kings.
15	417,090	+ 1.898	Part of Kings.
16	417,478	+ 1.992	Richmond, Part of Kings.
17	390,742	− 4.540	Part of New York.
18	390,861	− 4.511	Part of New York.
19	390,023	− 4.715	Part of New York.
20	390,363	− 4.632	Part of New York.
21	390,552	− 4.586	Part of New York, Part of Bronx.
22	390,492	− 4.601	Part of Bronx.
23	390,228	− 4.665	Part of Bronx.
24	390,057	− 4.707	Part of Bronx.
25	420,146	+ 2.644	Putnam, Part of Westchester.
26	420,467	+ 2.722	Part of Westchester.
27	409,349		Rockland, Orange, Sullivan, Delaware.
28	396,122	− 3.225	Dutchess, Ulster, Columbia, Greene, Schoharie.
29	425,822	+ 4.031	Albany, Schenectady.
30	415,030	+ 1.394	Rensselaer, Saratoga, Washington, Warren, Fulton, Hamilton, Essex.
31	425,905	+ 4.051	Clinton, St. Lawrence, Jefferson, Lewis, Franklin, Oswego.
32	385,406	− 5.843	Oneida, Madison, Herkimer.

C.D.		*Dev.%*	*Description.*
33	415,333	+ 1.468	Chemung, Broome, Tioga, Tompkins.
34	423,028	+ 3.348	Onondaga.
35	386,148	− 5.662	Ontario, Yates, Seneca, Cayuga, Cortland, Chenango, Otsego, M'gomery.
36	410,943	+ 0.396	Part of Monroe, Wayne.
37	410,432	+ 0.271	Part of Monroe, Orleans, Genesee, Wyoming, Livingston.
38	382,277	− 6.608	Chautaqua, Cattaraugus, Allegany, Steuben, Schuyler.
39	435,393	+ 6.369	Part of Erie.
40	435,684	+ 6.440	Part of Erie, Niagara.
41	435,880	+ 6.488	Part of Erie.

State Mean..... 409,324
Largest District (41st C. D.)..... 435,880
Smallest District (38th C. D.)..... 382,277
Citizen Population Variance (largest district population divided by the smallest district population)..... 1.139 to 1
Maximum Deviation above State Mean..... 6.488%
Maximum Deviation below State Mean..... 6.608%

[illegible] ROCKEFELLER

[illegible]

[illegible], Tampa, [illegible]

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SUPREME COURT OF THE UNITED STATES

No. 238.—October Term, 1968.

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[April 7, 1969.]

Mr. Justice Fortas, concurring.

I concur in the judgment of the Court and in its opinion except to the extent that the opinion relies upon the Court's opinion in the Missouri redistricting cases, *ante*, p. —, which I have not joined for the reasons stated in my concurring opinion in those cases.

New York does not attempt to defend its plan as a good-faith effort to achieve districts of approximate equality. It argues that it devised a plan based upon the grouping of districts into regions. I agree with the majority that, for purposes of the congressional districting here involved, the State may not substantially or grossly disregard population or residence figures in order to recognize regional groupings within the State. See my dissent in *Avery* v. *Midland County*, 390 U. S. 474, 495 (1968).